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IN THE
Supreme Court of the United States

October Term, 1961
No. ~~1961~~ 117

IN THE MATTER
of
JOHN W. SOERGEL, THOMAS MAFRICI, LEO R. PRIEST, THOMAS CRANDALL, CARMEN FERRANTE, CHARLES TEDESCO and the BOARD OF TRUSTEES OF UNION FREE SCHOOL DISTRICT NO. 6,

Appellants,

—*vs.*—

JAMES E. ALLEN, as Commissioner of Education of the State of New York,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

JURISDICTIONAL STATEMENT

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Appellants,

—*vs.*—

JAMES E. ALLEN, as Commissioner of Education of the State of New York,

Appellee.

On Appeal From The Court Of Appeals
Of The State Of New York

Jurisdictional Statement

Appellants appeal from the final judgment of the Court of Appeals of the State of New York, entered in this proceeding on January 5, 1961, affirming an order of the Ap-

pellate Division of the Supreme Court of the State of New York, Third Department, entered on August 7, 1960, which affirmed an order of the Supreme Court of the State of New York, Albany County, entered in Albany County on September 2, 1959, dismissing the petitions herein. Appellants submit this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

Opinion Below

The opinion of the New York Supreme Court, Albany County, is not yet reported. The opinion of the Appellate Division is reported in 10 A. D. 2d 767, 197 N. Y. S. 2d 635. The affirmance of the Court of Appeals is reported in 9 N. Y. 2d 633, 210 N. Y. S. 2d 233. Copies of the opinion and order of the Supreme Court, Albany County, the opinion and order of the Appellate Division, and the judgment and remittitur, as amended, of the Court of Appeals are printed in Appendix A hereto.

Jurisdiction

This proceeding was brought under Article 78 of N. Y. Civil Practice Act, to set aside or modify an order of the Commissioner of Education of the State of New York. The order of the Appellate Division, affirming the order of the New York Supreme Court, Albany County, dismissing the petitions, was affirmed on January 5, 1961, by the Court of Appeals. A notice of appeal was filed in the New York Supreme Court, Albany County, on March 29, 1961. The jurisdiction of the Supreme Court of the United States to review this decision by appeal is conferred by Title 28, United States Code, Section 1257 (2). The fol-

lowing decisions sustain the jurisdiction of the Supreme Court to review on appeal the judgment in this case: *Kedroff* v. *St. Nicholas Cathedral of Russian Orthodox Church*, 344 U. S. 94; *Chesebro* v. *Los Angeles County Flood Control Dist.*, 306 U. S. 459; *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282.

Statutes and Constitutional Provisions Involved

Chapters 518 and 626 of N. Y. Laws of 1926; Art. 37, sec. 1801 of N. Y. Education Law; and, the pertinent provisions of the 14th Amendment of the Constitution of the United States are set forth in Appendix B hereto.

Questions Presented

May a State require the residents of an area to support a local school system by local real estate taxes where the area can have no need for the school system and can derive no benefit from it — without the rights of these residents under the Due Process and Equal Protection clauses of the Fourteenth Amendment being denied?

As is shown more fully in the Statement of this Case, *infra*, under the circumstances here, the question may be stated more particularly as follows:

Where a school district has now, and will continue to have, a public school system available to it by act of the New York Legislature (as payment for the loss of other district property), may the Education Law of New York, and the statutes under which the school system was provided, be construed to empower and allow the Commissioner of Education of New York to require the district to support a second, superimposed, school system — for which the district has no need and from which the district can derive no benefit — without such construction violat-

ing the Due Process and Equal Protection clauses of the Fourteenth Amendment by subjecting the residents of the district to a tax without benefit.

Statement of Case

Before April, 1926, Union Free School District No. 6, Town of DeWitt, County of Onondaga, State of New York, was a large school district. The Village of Eastwood, which adjoined the City of Syracuse, made up most of the District; the remainder was located in the Town of DeWitt. The District had its own adequate school system and owned its own school building, located in Eastwood.

In 1926, the Village of Eastwood, and some parts of the remainder of the District, were annexed to the City of Syracuse by act of the New York Legislature. N. Y. Laws of 1926, Chapters 518 and 626.

There remained an unannexed portion of the District, a thin crescent-shaped parcel hugging the eastern boundary of Syracuse. This unannexed portion became a "separate and distinct school district until changed according to law" under the annexation statutes. N. Y. Laws of 1926, Chapter 518, sec. 2, and Chapter 626, sec. 6. That unannexed portion is the present Union Free School District No. 6, Town of DeWitt, County of Onondaga, State of New York (hereafter called "District No. 6").

Under the annexation statutes all real and personal property belonging to the District and located in the portion annexed became the property of the City of Syracuse. N. Y. Laws of 1926, Chapter 626, sec. 4. But although the District's only school building was thus lost to the City of Syracuse, District No. 6 remained obligated to pay its proportional share on the bonds issued for the construction of it, under a formula set up by the annexation

statutes. N. Y. Laws of 1926, Chapter 518, sec. 3, and Chapter 626, sec. 3.

The general plan of annexation was completed by section 2 of Chapter 518 which provided:

> "The board of education of the city of Syracuse shall upon request grant permission to children residing in the part of such school districts [sic] not annexed, to attend schools under the care and control of the board without the payment of any tuition therefor."

After the annexation District No. 6 continued to function and assessed upon the real property of the district the taxes necessary to meet the school expenses of the district.

On June 10, 1957, the Commissioner of Education of the State of New York established a central school district by order pursuant to N. Y. Education Law, Art. 37 (and particularly section 1801 thereof). District No. 6, along with twelve other school districts, was included in the central system laid out by the Commissioner's order.

The order laying out the central school district did not purport to otherwise effect the rights and obligations of District No. 6. It made no provision concerning the right of the District's children to attend Syracuse schools tuition free; it made no provision concerning the bonded indebtedness of the District on the school which had been lost to the city — whether already paid, or then-owing.

Under the plan of centralization, the other twelve school districts involved were to have their school system merged into the central system. District No. 6, however, on the face of the order, was to continue to have the public schools of Syracuse as its own schools.

And in the briefs of Respondent in the New York Courts, it was conceded that "the inclusion of District No. 6 in the proposed central school district will not effect the

right of any pupil to attend the Syracuse schools without tuition if he cares to take advantage of that right." (Respondent's Brief, Appellate Division, p. 9; Respondent's Brief, Court of Appeals, p. 9.)

In effect, then, the order of the Commissioner of Education simply gave a second school system to District No. 6. The Syracuse schools remained, and the Districts right to use them continued.

Appellants John W. Soergel, Thomas Mafrici, Leo R. Priest, Thomas Crandall and Carmen Ferrante, with others, began a proceeding under Article 78 of N. Y. Civil Practice Act on June 25, 1957. Their petition sought to set aside or modify the order of the Commissioner, to the end that District No. 6 would be excluded from the proposed central district.

Among the grounds for setting the order aside was the following:

> "21. The action of the Commissioner of Education in including Union Free School District No. 6 as a part of Central District No. 1 * * * is unconstitutional in that it deprives petitioners and other taxpayers of Union Free School District No. 6 of their property without due process of law and in that it impairs the obligation of contract and in that it amounts to administrative repeal of Chapters 518 and 526 [sic] of the Laws of 1926 which were enacted for the benefit of your petitioners and persons similarly situated." (Petition of Petitioners, par. 21, pp. 13R-14R *.)

This contention was supported by allegations that: District No. 6 had the right to free education for its children in Syracuse schools (Petition of Petitioners, pars. 5, 8, pp. 8R-10R, 11R); including the District in a central district would materially increase its taxes (Petition of

* This and similar references are to the pages of the Record herein, as indicated on the lower right margin of the pages thereof.

Petitioners, pars. 6, 11, pp. 10R-11R, 12R); and, there would be no benefit received for the tax burden created (Petition of Petitioners, par. 20, p. 13R).

The petition of Appellants Charles Tedesco and the Board of Trustees of Union Free School District No. 6, with others, as intervening petitioners, again showed that District No. 6 had the right to free education in Syracuse schools for its children (Petition of Intervening Petitioners, pars. 11, 12a, pp. 32R-33R); that all educational needs were being met under the then-existing educational program (Petition of Intervening Petitioners, par. 12d, p. 34R); that inclusion of the District in the central district would increase its tax obligations (Petition of Intervening Petitioners, pars. 14, 17, pp. 37R-38R); and, that it followed that the residents of the District would receive no benefit for the taxes they would thus incur (Petition of Intervening Petitioners, par. 18, pp. 38R-39R). The order of the Commissioner was therefore attacked as unconstitutional (Petition of Intervening Petitioners, par. 18, pp. 38R-39R).

All the Appellants here are residents and taxpayers of District No. 6.

The decision of the New York Supreme Court stated that petitioners and intervening petitioners

> "also contend that his [the Commissioner's] order, in effect, repeals Chapters 518 and 626 of the laws of 1926, thereby depriving petitioner and other taxpayers of Union Free School No. 6 of their property without due process of law and impairs the obligation of contract; which by virtue of such chapters of the law was created for the benefit of the taxpayers of such district." (2a *.)

* This and similar references are to the pages of the appendix hereto.

The section of the Education Law under which the Commissioner acted (Section 1801) was held to place no limitation on his power to lay out central school districts

> "except that he shall include therein only territory 'of suitable size conveniently located for the attendance of pupils and having a sufficient number of pupils for the establishment of a central school,' and shall not include therein a city school district in a city of a given population." (4a.)

Under this construction of the Education Law the New York Supreme Court decided that the problem of the increased taxes the District would have to pay was no bar to centralization although the District would receive no benefit for the extra taxes.

The New York Supreme Court held that District No. 6 could be required to support a second district — the central district — while an earlier-established school system continued to operate.

Appellants briefed and argued their constitutional objections to the decision of the New York Supreme Court in their appeal to the Appellate Division. They contended that the construction of N. Y. Laws of 1926, Chapters 518 and 626, made below violated the Fourteenth Amendment by requiring the residents of the District to support a school system in addition to the one provided under the Laws of 1926. (Appellants' Brief in Appellate Division, Point III C.) Loss of equal protection of the laws was claimed.

They also contended that they were being deprived of property without due process under such a construction because District No. 6 was being put into a school district from which it could derive no possible benefit. (Appellant's Brief in Appellate Division, Point III D.)

The order of the New York Supreme Court, dismissing the petitions on the merits, was affirmed by the Appellate Division.

Appellants carried their constitutional objections to the Court of Appeals. There, in Point III C of their Brief, they argued that the construction of N. Y. Laws of 1926, Chapters 518 and 626, deprived them of due process of law and of the equal protection of the laws. In Points V and VI it was argued that the construction of Article 37 of the Education Law — that it authorized the inclusion of the District in a central school district in spite of the continuing right to free education in Syracuse schools — also violated the Due Process and Equal Protection clauses of the Fourteenth Amendment.

The Court of Appeals affirmed without opinion (14a-16a). In its amended remittitur, the Court of Appeals stated:

> "Upon the appeal herein there were presented and necessarily passed upon questions, under the Constitution of the United States, as follows: Appellants contended that Chapters 518 and 626 of the Laws of 1926 and Article 37 of the Education Law of the State of New York as interpreted by the Commissioner of Education and construed by the Courts of this State denied them equal protection of the laws and deprived them of their property without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States. This Court held there was no such denial or deprivation." (18a.)

The Questions are Substantial

The issue in this case is whether there are any limits at all on the power of the State to act in the name of public education.

If the power of the State is absolute — if the State may do as it chooses so long as an effect of its activity is to

provide schools for the children of its citizens — then Appellants have no right to be before this Court.

But if the State's power has some limits, Appellants believe their case must be heard.

Without a clear statement of the basic limitations of State power — now — it seems certain that wrongs like those done to Appellants here will be repeated.

Appellants submit that there must be at least one limitation on the power of the State to provide for education. The State must fairly balance the interests of its citizens in education against the interests of its citizens in the preservation of their property. In the terms of a more common test, the State must provide a real benefit in return for the taxes it extracts — for education as for any other governmental activity. *Wisconsin* v. *J. C. Penney Co.*, 311 U. S. 435, 444; Antieau, *Commentaries on the Constitution of the United States* (1960), p. 98; see 2 Cooley, *Constitutional Limitations* (8th ed. 1927) Ch. 14, pp. 1026, 1029.

The State of New York goes about the job of providing funds for education by taxation on two levels. It obtains revenue from various State-wide levies. N. Y. Tax Law, Arts. 9, 9-A, 9-B, 9-C, 11, 12, 12-A, 16, 16-A, 18, 19, 20, 21. A part of the revenue received is distributed to the schools of the State. N. Y. Constitution, Art. 11, sec. 1; N. Y. Education Law, Art. 73 (see, especially, sec. 3601 to sec. 3603-a). The benefit each citizen of the State receives, as a citizen of the State, is a roughly uniform educational system in which no particular area suffers because of a relative lack of wealth.

On the local level, the citizen is responsible to the school district in which he resides. The realty of each district is taxed to provide support for the conduct of the school system in the district. N. Y. Constitution, Art. 8, sec. 10;

N. Y. Education Law, Art. 41, sec. 2022; N. Y. Education Law, Art. 71, secs. 3501 (1) and 3502 (1). The benefit that the resident of the district receives, as a resident of a particular locality, is the excellence of the specific school system in his locality.

Appellants here reside in District No. 6. This District, as a result of the passage of statutes by the Legislature of the State of New York, has the schools of the City of Syracuse for its school system. N. Y. Laws of 1926, Chapters 518 and 626. These same statutes fixed the obligations of the residents of the District for support of this school system.

And the Syracuse schools will continue to be available to the children of the residents of the District indefinitely. (Opinion of the New York Supreme Court, 6a; Opinion of Appellate Division, 12a.)

The Commissioner of Education, at some time around 1956, determined that District No. 6 was not paying enough taxes for the support of education. He therefore decided to include the district in a plan of centralization because

> "in order to provide an adequate tax base for sound financing [of the central district], it is necessary to include all of the territory of the proposed central district including District No. 6." (Affidavit of James E. Allen, p. 5, p. 57R.)

The Commissioner, by including District No. 6, set about adjusting the tax burdens of the District so that they would be, in his view, more equitable.

The Commissioner's reading of N. Y. Education Law, Art. 37, was that he had the power to do such a thing in spite of the provisions of N. Y. Laws of 1926, Chapters 518 and 626. The courts of the State of New York have upheld his construction of these statutes.

But what this action by the Commissioner of Education means is that the Appellants here, and the other residents of the District, have been saddled with a new and entirely unwarranted tax burden in the name of education. They have been ordered to support a second school system; to carry the burden of public schools other than their own.

This tax is not a State tax. It is to be levied upon only the residents of this District, not upon all the citizens of the State.

Appellants believe that the situation they have been placed in by the proposed centralization is factually the same as that in *Paducah-Illinois R. R.* v. *Graham*, 46 F. 2d 806 (W. D. Ky.). There a school district was formed which included a parcel of land under the Ohio River. The only improvement on this land was plaintiff's railroad bridge. The bridge was assessed at a value equal to three-quarters of the entire assessed valuation of the district. The Court concluded, at 46 F. 2d 810:

> "If the inclusion of plaintiff's railroad bridge in the taxing district is so unnatural and so unreasonable as clearly to show that the sole purpose of the inclusion was to add to the taxable value of the property in the district, such inclusion would amount to spoilation and the taking of plaintiff's property without due process of law. The primary idea in the consolidation of school districts is to furnish a more efficient system of common schools to the people of the district. There could be no valid purpose in creating a consolidated district where there were no pupils to be served."

There are no pupils to be served in District No. 6, for the school system of the District continues.

It has never been questioned that the Syracuse schools are adequate for the needs of the District. Nor has it been suggested that a central school would be superior educa-

tionally to the City schools. The important fact, however, is that the City schools will continue to be open to the children of the District, and not that they are, on balance, better schools than the proposed central school.

For it is the clear purpose of the Education Law that each school district will provide *one* school system. If the district is centralized, it ceases to be, and is merged into the central district. Its schools become a part of the central school system. See, N. Y. Education Law, Art. 37.

This fact makes the real estate taxes imposed by school districts in the State of New York much like local improvement taxes. The benefit which they — like all taxes — must confer is special because it is local. Something tangible, of value to the one school system of the district, must be produced within the district itself.

In *Kansas City So. Ry.* v. *Road Improvement Dist. No. 6*, 256 U. S. 658, a road district had been created under an Arkansas statute in a rural area of the state. Plaintiff's property — about 10 miles of track, with a right of way and buildings — was assessed at $7,000 per mile for its share of the costs of building a road in the district. Privately owned property was assessed according to a zone classification, with the land nearer the road bearing a heavier tax than land farther removed from it.

Plaintiff attacked the state statute as violating the Fourteenth Amendment. The Arkansas courts held the statute valid; the Supreme Court reversed. The Supreme Court pointed out that the Railway had been assessed according to "vague speculation as to present worth and possible future increased receipts * * *." (256 U. S. at 660) The Court stated:

> "If, however, the statute providing for the tax is 'of such a character that there is no reasonable presumption that substantial justice generally will be

done, but the probability is that the parties will be taxed disproportionately to each other and to the benefit conferred the law cannot stand against the complaint of one so taxed in fact.' Gast Realty Co. v. Schneider Granite Co., supra [240 U. S. 55, 59]." (Matter in brackets added.) (256 U. S. at 660)

In *Thornton* v. *Road Improvement Dist. No. 1*, 291 Fed. 518 (C. C. A. 8th Cir.), app. dism. 269 U. S. 592, a road district was formed in Arkansas, and assessments for proposed roads were made. Then a new road was proposed to be partly within the district already formed and partly outside it. A special law was passed by the Arkansas Legislature charging the entire cost of the new road against the property outside the already formed district. That property belonged to certain nonresidents who became the plaintiffs in the case.

Plaintiffs' suit for relief from the tax was dismissed on the merits below. The Circuit Court of Appeals reversed, holding that the assessments violated the Fourteenth Amendment. The Circuit Court pointed out that the part of the road within the already formed district was of no benefit whatsoever to the area being taxed (the area outside the district). The taxes were consequently arbitrary and grossly excessive.

In *Risley* v. *City of Utica*, 168 Fed. 737 (N. D. N. Y.), a special tax was involved. The State of New York authorized the City of Utica to contract to supply water within its limits, and to collect the necessary moneys by taxation. Plaintiff sought to enjoin the collection of the tax on the grounds that it violated the Fourteenth Amendment. A demurrer by the City was sustained on the ground that the jurisdictional amount was not in controversy. But the Court stated, at pages 747 to 748, that the tax violated the Constitution because it extracted money from plaintiff

without there being any return given him. (Plaintiff's property was not serviced by any water main.)

In *Myles Salt Co.* v. *Board of Commissioners*, 239 U. S. 478, plaintiff's property was included in a drainage district although it was so situated that it could not possibly face any danger of flooding. A finding of no cause of action below was reversed and the case was remanded with the Court stating at 239 U. S. 485:

> "It is to be remembered that a drainage district has the special purpose of the improvement of particular property, and when it is so formed to include property which is not and cannot be benefited directly or indirectly, including it only that it may pay for the benefit to other property, there is an abuse of power and an act of confiscation."

No benefit will come to District No. 6 as a result of the proposed centralization. The District will be paying for another locality's school system. All it will receive for this will be the privilege of forsaking the schools it now has and will continue to have.

Appellants believe that there is nothing about their District that justifies it being burdened with the obligations of a second local school system. They can see no reason why they should have some special sort of communital responsibility to other school districts in the State that no other group has. They submit that they have been deprived of their property by the construction of the Education Law and the Laws of 1926 made by the New York Courts which has opened them to this double liability.

They submit that the carefully drawn Laws of 1926 — providing free education as consideration for the taking of the District's school and the continuing obligation of the District to pay on the bonds issued for construction of

the school — become a fraud under such a construction. The taking becomes one without recompense.

And they submit that they have been put into a special classification as a result of these constructions. On the principle of *Quaker City Cab Co.* v. *Pennsylvania*, 267 U. S. 389, this classification is palpably unreasonable. Because they have been so classified, Appellants submit that they have been denied the equal protection of the laws. See *Louis K. Liggett Co.* v. *Lee*, 288 U. S. 517.

If the Commissioner of Education has the power under the Education Law to indulge in what might be called spot tax equalization here, then he has the power to do it elsewhere. There is no reason why a school district in suburban Long Island cannot be required to "adopt" a less favored district in the Bronx, or Buffalo. For if this action of the Commissioner of Education can free the State of New York from the troublesome task of equitably distributing the burden of its taxes under the circumstances here (see, *Stewart Dry Goods Co.* v. *Lewis*, 294 U. S. 550, 560) — there will be no case where the same thing cannot again be done.

Appellants believe that the questions presented by this case are substantial and that they are of public importance.

Respectfully submitted,

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APPENDIX A.

Opinion of New York Supreme Court.

SUPREME COURT—County of Albany.

In the Matter of the Application
of
JOHN W. SOERGEL, et al.

(Albany County Special Term, May 22, 1959)
(Justice William Deckelman, Presiding)

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MEMORANDUM

DECKELMAN, J.

This is a proceeding pursuant to Article 78 of the Civil Practice Act for an order reviewing, vacating or modifying an order made by James E. Allen, as Commissioner of Education of the State of New York, purporting to lay out Central School District No. 1 of the Towns of DeWitt, Manlius and Cicero, Onondaga County, and Sullivan, Madison County, dated June 10, 1957.

The proceeding was originally returnable at Special Term, Albany County on July 26, 1957, and for reasons set forth in the papers submitted was adjourned by stipulation and was finally brought on at Special Term, Albany County, on May 22, 1959, at which time certain residents

and taxpayers of common School District No. 3 of the Town of DeWitt and of Union Free School District No. 6 of the said Town of DeWitt petitioned for an order permitting them to intervene and have their petitions considered in this proceeding.

It appears that on June 10, 1957 the said Commissioner of Education made an order laying out Central School District No. 1 of the Towns of DeWitt, Manlius and Cicero, Onondaga County, and Sullivan, Madison County, in pursuance of Article 37 of the Education Law, and that on April 25, 1959, the voters of such centralized District approved the organization of such central school district.

The contention of the petitioners, as well as that of the proposed intervenors, is that the Commissioner of Education in laying out such Central School District exceeded the power conferred upon him by Statute and in so doing was capricious and arbitrary.

They also contend that his order, in effect, repeals Chapters 518 and 626 of the laws of 1926, thereby depriving the petitioner and other taxpayers of Union Free School No. 6 of their property without due process of law and impairs the obligation of contract; which by virtue of such chapters of the law was created for the benefit of the taxpayers of such district.

The powers of the Commissioner to lay out and control School Districts are set forth in Section 1801 of the Education Law which is as follows:

Sec. 1801. FORMATION AND CHANGES OF CENTRAL SCHOOL DISTRICTS.

1. The commissioner of education is hereby authorized and empowered to lay out central school districts for the establishment of central schools to give instruction in elementary or elementary and high school subjects and to fix, determine and define the boundaries of said districts as hereinafter provided.

2. The commissioner is authorized and empowered to make and enter in his office orders laying out territory in new central school districts or annexing to existing central school districts territory not contained within a city school district in a city having a population of more than ten thousand inhabitants, and not contained within a city school district having a full valuation of taxable real estate per public school pupil residing in the district of more than fifteen thousand dollars; provided, however, that no territory contained within a city school district in a city having a population of ten thousand inhabitants or less may be included in new central school districts or annexed to existing central school districts after July first, nineteen hundred fifty-five. The commissioner in laying out such central school districts and in fixing and defining the boundaries thereof shall include only territory of suitable size conveniently located for the attendance of pupils and having a sufficient number of pupils for the establishment of a central school. The commissioner shall designate all central school districts by name, number and such other description as he shall deem proper.

3. Within ten days after the making and entry of the order pursuant to this section, the commissioner shall transmit a certified copy thereof to the clerk, or in the event there is no clerk, to the trustee or trustees of each school district the territory of which is affected by said order. The clerk, the trustee or trustees, as the case may be, shall, within five days after receipt of such order, post a copy thereof in five conspicuous places in such district.

4. No central school district laid out by order of the commissioner shall operate as a central school dis-

trict, nor be entitled to receive the benefits of a central school district until it has been organized by the qualified voters of the district in accordance with the provisions of this article, provided, however, a central school district which was organized prior to April seventh, nineteen hundred forty-four, or pursuant to the provisions of this section and to which territory may be annexed shall not be required to again organize."

I find no limitation or restriction in the statute of the Commissioner's power to establish central school districts and to fix and determine boundaries, except that he shall include therein only territory "of suitable size conveniently located for the attendance of pupils and having a sufficient number of pupils for the establishment of a central school," and shall not include therein a city school district in a city of a given population. In his discretion, he may lay out new central school districts embracing the territory of common school district, Union Free School Districts and Central School Districts, except within certain municipalities whose population is less than 10,000 inhabitants.

The section does not prohibit the laying out of a central school district because one of its component parts will have an increased tax rate nor does it limit its establishment because a school system and program is satisfactory to its inhabitants and is in effect in an existing district, the territory of which is taken by the order. The determination of the boundaries of central school districts which necessarily involves the grouping of existing districts and educational soundness of their creation, subject only to the indirect approval of his act by the qualified voters of the created district, are left to the discretion of the commis-

sioner and will not be disturbed if not arbitrarily and capriciously exercised.

See *Gardner* v. *Ginther*, 232 A. D. 296, affirmed 257 N. Y. 578.

Petitioner's objection to the creation of the district is based upon the fact that it includes Union Free School District No. 6 of the Town of DeWitt and the parties who move to intervene seem to object only to the inclusion of such District and Common School District No. 3 of the Town of DeWitt.

The reasons for such objection in so far as Union Free School District No. 6 is concerned is that the legislature in 1926 enacted Chapter 518 and Chapter 626 of the laws of 1926 which in effect provide that a portion of Union Free School District No. 6 be annexed to the City of Syracuse and that portion not annexed shall continue as a Union Free School District until changed by law, and that such remaining district shall pay its proportionate share of the existing bonded indebtedness.

Chapter 518 also provides that the Board of Education of the City of Syracuse shall upon request grant permission to children residing in the part of such district not annexed to attend school under the care and control of the board without payment of tuition.

Both petitioners and the proposed intervenors contend that the inhabitants of their respective districts are almost unanimously opposed to the centralization and are satisfied with present educational facilities and that including such districts will greatly increase the taxes for educational purposes in the respective districts.

It appears that the Commissioner in his determination followed the master plan for school district reorganization in New York State which was recommended by the joint

committee of the Legislature. (New York State Legislature Document 1947, No. 25) except in instances where districts had been consolidated or had been annexed to another district. While the Commissioner was not required to abide by the findings of that committee, the fact that he did impress me that his act was not arbitrary or capricious.

Chapters 518 and 626 of the laws of 1926 in my opinion are not affected by the order of June 10, 1957. That portion of Union Free School District No. 6 not annexed to the City of Syracuse continued as a School District until changed according to law.

So far as increased taxation is concerned, see *In Re School District 3 Town of Oyster Bay* v. *Allen*, 6 A. D. 2nd 316, affirmed by Court of Appeals May 29, 1959.

So far as the wishes of the inhabitants of the districts as to centralization and the fact that they are satisfied with present educational facilities, see above in *Re School District 3 Town of Oyster Bay* v. *Allen*, 6 A. D. 316, affirmed by Court of Appeals May 29, 1959.

The fact that, as contended, such districts are in proximity to Syracuse does not make them City Districts. They were Union Free School and Common School Districts at the time the order was made.

I have granted the application to intervene and considered the petitions and affidavits of such intervenors.

For the reasons above stated I am convinced that the Commissioner's order was a proper exercise of the discretionary powers vested in him by Statute and his determination was not arbitrary or capricious.

Application denied and petition dismissed upon the merits without costs.

Submit order accordingly.

Order of New York Supreme Court.

At a Special Term of the Supreme Court of the State of New York held in and for the County of Albany at the Court House in the City of Albany on the 22nd day of May 1959.

Present—Honorable William Deckelman,
Justice Presiding.

In the Matter of the Application
of
JOHN W. SOERGEL, et al.

Upon reading and filing the annexed petition of John W. Soergel, John R. Wheeler, Thomas Mafrici, Leo R. Priest, John D. Scheibel, Thomas Crandall, Carmen Ferrante, Bristol Laboratories, Inc., Oberdorfer Foundries, Inc., Lamson Corporation and Roth Bros. Metal Co. Inc., verified on the 14th and 24th days of June 1957, seeking to review the order of the Commissioner of Education laying out and designating Central School District No. 1 of the Towns of DeWitt, Manlius and Cicero, Onondaga County and Sullivan, Madison County, the affidavit of Raymond A. Hust, sworn to on June 24, 1957, the Order to show cause in the above entitled proceeding, signed by Honorable Isadore Bookstein, Justice of the Supreme Court, dated June 25, 1957, the Amended Order to show cause dated the same day, the stipulation by and between the attorneys for the parties to the above entitled proceeding striking the above entitled proceeding from the calendar subject to restoration by any party upon ten days notice, the notice restoring said proceeding to the calendar dated April 21, 1959, the answer of respondent, James E. Allen, Jr., as Commissioner of Education verified on the 21st day of May 1959 together with Exhibits 1 through 10 inclusive

returned with said answer, the affidavit of James E. Allen, Jr., sworn to on the 13th day of June 1959, the affidavit of Robert Edwards, sworn to on the 10th day of June 1959 and the affidavit of John M. Hastings, Jr., sworn to on the 15th day of June 1959, the affidavit of Marcella Scheibel, sworn to on the 17th day of June 1959, the affidavit of Francis Patsos, sworn to on the 17th day of June 1959, the notice of application on behalf of John Macken, Charles Tedesco, Marcella Scheibel, the Board of Trustees of Union Free School District No. 6 and Francis Patsos, Albert Trendell, Paul Wheelock and the Board of Trustees of Common School District No. 3 for an Order permitting said last named persons (hereinafter referred to as petitioners-intervenors) to intervene in this proceeding as petitioners, the affidavit of Stewart F. Hancock, Jr., sworn to on the 12th day of May 1959, the joint affidavit of Jack Macken, Charles Tedesco, Marcella Scheibel, Francis Patsos, Albert Trendell and Paul Wheelock, sworn to on the 12th day of May 1959, the petition of Jack Macken, Charles Tedesco, Marcella Scheibel, The Board of Trustees of Union Free School District No. 6, Town of DeWitt, County of Onondaga, State of New York, Francis Patsos, Albert Trendell, and Paul Wheelock and The Board of Trustees of Common School District No. 3, Town of DeWitt, County of Onondaga, State of New York, verified on the 12th day of May 1959, and all of the exhibits attached thereto, the affidavit of Francis Patsos, sworn to on the 12th day of May 1959, the affidavit of Jack Macken, sworn to on the 12th day of May 1959, the affidavit of Elizabeth M. Eastman, sworn to on the 21st day of May 1959, in opposition to said application to intervene and on all of the papers heretofore filed and proceedings heretofore had herein and, after hearing Hancock, Dorr, Ryan

& Shove, Esqs. (Stewart F. Hancock, Jr., Esq., of counsel), attorneys for petitioner and for proposed intervenors and Charles A. Brind, Esq. (Elizabeth M. Eastman, Esq., of counsel) on behalf of respondent, Commissioner of Education, and due deliberation having been had,

Now on motion of Hancock, Dorr, Ryan & Shove, attorneys for petitioners-intervenors, it is

ORDERED that the application of said petitioners-intervenors to intervene in the proceeding and to have their petition considered herein be and the same hereby is granted, and

On motion of Charles A. Brind, Jr., Esq., Attorney for respondent, it is

ORDERED that the petitions of the said petitioners and said petitioners-intervenors herein be and the same hereby are dismissed on the merits without costs.

Signed August 24, 1959

ENTER in Albany County

WM. DECKELMAN
J. S. C.

Opinion of Appellate Division.

In the Matter of JOHN W. SOERGEL et al., Petitioners, and Jack Macken et al., Intervening Petitioners, for the review and vacating or modification of an order granted and made by James E. Allen, as Commissioner of Education of the State of New York, dated June 10, 1957, purporting to lay out a Central School District to be known as Central School District No. 1 of the Towns of DeWitt, Manlius and Cicero, Onondaga County and Sullivan, Madison County.

Supreme Court, Appellate Division,
Third Department
March 18, 1960

Hancock, Dorr, Ryan & Shove, Syracuse, for appellants.

Charles A. Brind, Jr., Albany, for respondent Commissioner.

Before BERGAN, P. J., and COON, GIBSON, HERLIHY and REYNOLDS, JJ.

MEMORANDUM DECISION

Petitioners appeal from an order dismissing an Article 78 proceeding brought to review the determination of the Commissioner of Education which laid out and designated a central school district. The authority of the Commissioner is challenged generally and in particular that a special statute pertaining to School District No. 6 prohibits its inclusion in the proposal.

The Commissioner's authority for acts of centralization is contained in Article 37 of the Education Law, which includes Section 1801, and which provides in part as follows:

"§ 1801. Formation and changes of central school district

"1. The commissioner of education is hereby authorized and empowered to lay out central school dis-

tricts for the establishment of central schools * * * and to fix, determine and define the boundaries of said districts as hereinafter provided.

"2. * * * The Commissioner in laying out such central school districts and in fixing and defining the boundaries thereof shall include only territory of suitable size conveniently located for the attendance of pupils and having a sufficient number of pupils for the establishment of a central school."

[1] Such facts as a close vote on consolidation, increase in school taxes, inconvenience to pupils and other complaints from individuals, groups and school districts opposed to change have been before this court on many occasions. We have no control over the decision of the Commissioner as long as he carries out the laws as enacted by the Legislature. Matter of Board of Education of Union Free School District No. 3 of Town of Oyster Bay, Nassau County v. Allen, 6 App. Div. 2d 316, 177 N. Y. S. 2d 169, affirmed 6 N. Y. 2d 871, 188 N. Y. S. 2d 988.

Here, the Commissioner, acting within the framework of the law and within the authority vested in him, properly laid out the proposed central school district and the lower court correctly determined his acts were not arbitrary or capricious.

[2] School District No. 6 raises the further argument that a special statute forecloses the Commissioner from including it under the plan of consolidation. In the Laws of 1926 by Chapters 519, 2, and 626, a substantial part of this school district was annexed to the Syracuse City School District and after including provisions as to the payment of bonds, it provided:

"* * * The remainder of union free school district number six * * * not annexed to the city of Syracuse, shall remain separate and distinct school districts as now constituted *until changed according to law*. The

board of education of the city of Syracuse shall upon request grant permission to children residing in the part of such school districts not annexed, to attend schools under the care and control of the board without the payment of any tuition therefor." (Emphasis supplied.)

The petitioners contend that the phrase "until changed according to law" means that the school district remains as a separate entity until changed by an act of the Legislature.

The Commissioner concludes such acts have no such special meaning and do not govern or interfere with his right to centralize the district. The laws in 1926 relating to formation of central rural high schools were amended in 1944 to provide for central school districts such as here involved.

It seems evident that the Commissioner's decision is not changing the law — he has no such right — but is forming a new central school district, a right given to him by Section 1801 of the Education Law. His act does not interfere with payment of the bonded indebtedness or with the children to attend the City of Syracuse schools tuition free. To hold that the Education Law as to centralization is inapplicable to District No. 6 — under the circumstances herein — would be a narrow and unwarranted interpretation and implementation to the Laws of 1926 beyond its intended purpose. If need be, it could be further argued that the phrase "until changed according to law" was in fact changed by the 1944 amendment to the Education Law which gave to the Commissioner the right to organize central school districts such as here involved.

Order unanimously affirmed, without costs.

Order of Appellate Division.

At a Term of the Appellate Division, State of New York, held in and for the Third Judicial Department, in the City of Albany, New York, commencing on the 4th day of January, 1960.

Present: HON. FRANCIS BERGAN,
Presiding Justice.
HON. WILLIAM H. COON,
HON. JAMES GIBSON,
HON. J. CLARENCE HERLIHY,
HON. WALTER B. REYNOLDS,
Associate Justices.

In the Matter of the Application
of
JOHN W. SOERGEL, et al.

An application having been made by the petitioners above named to review the determination of the Commissioner of Education which laid out and designated Central School District No. 1 of the Towns of DeWitt, Manlius and Cicero, Onondaga County and Sullivan, Madison County, and said application having regularly come on to be heard at a Special Term of the Supreme Court held in and for the County of Albany before the Honorable William Beckelman in that Court by an order dated August 24, 1959 having dismissed said application on the merits without costs and an appeal having been taken by said petitioners from said order of the Supreme Court and said appeal having been duly brought to argument at the above term;

NOW, on reading and filing the record of all proceedings heretofore had herein and after hearing Hancock, Dorr, Ryan & Shove, Esqs., attorneys for petitioners-appellants and petitioner-intervenor-appellants (Stewart F. Hancock, Jr., Esq. of counsel) and Charles A. Brind,

Jr., Esq., attorney for respondent (Elizabeth M. Eastman, Esq., of counsel) and due deliberation having been had and a decision thereon having been handed down on March 18, 1960, it is

ORDERED that the order appealed from be and the same hereby is unanimously affirmed without costs.

J. ROBERT LANNON
Clerk

Judgment of New York Court of Appeals.

In the Matter of JOHN W. SOERGEL et al., as Taxpayers of Union Free School District No. 6, Town of DeWitt, Appellants, and JACK MACKEN et al., as Taxpayers and Members of the Board of Trustees of Union Free School District No. 6, Town of DeWitt, et al., Intervening Petitioners-Appellants, against JAMES E. ALLEN, as Commissioner of Education of the State of New York, Respondent.

Argued November 17, 1960; decided January 5, 1961.

Matter of Soergel v. Allen, 10 A D 2d 767, affirmed.

APPEAL, on constitutional grounds, from an order of the Appellate Division of the Supreme Court in the Third Judicial Department, entered April 7, 1960, which unanimously affirmed an order of the Supreme Court at Special Term (William Deckelman, J.), entered in Albany County, which, in a proceeding under article 78 of the Civil Practice Act, dismissed petitions for an order annulling a determination of the Commissioner of Education of the State of New York organizing Central School District No. 1 of the Towns of DeWitt, Manlius and Cicero, Onondaga County, and Sullivan, Madison County. This district was

organized and laid out by the Commissioner of Education under the power given him by section 1801 *et seq.* of the Education Law following studies of the educational systems in the area. The new district included Union Free School District No. 6 and Common School District No. 3 of the Town of DeWitt and 13 others. Prior to June 10, 1957, when the Commissioner issued the order laying out and organizing the new district, petitions signed by almost 100% of the qualified voters of district No. 6 and district No. 3 opposing centralization were submitted to the Commissioner. The resolution of centralization was passed, by a vote of 2,731 in favor of, to 2,683 opposed, in a referendum in which all the qualified voters in the new school district were entitled to vote. In their petitions appellants, comprising taxpayers in school districts No. 6 and No. 3 and the Board of Trustees of both school districts, alleged that their school districts were in industrial and commercial areas where the number of children of school age was declining; that their school taxes were low; that if they were included in the new school district their taxes would be greatly increased; that the present educational facilities were excellent and adequate, and that, in the case of district No. 6, students were entitled to be educated in the schools of the City of Syracuse at no cost to the student or the taxpayer by virtue of chapters 518 and 626 of the Laws of 1926. These laws provided for annexation to the City of Syracuse of portions of former Union Free School District No. 6 located in the Village of Eastwood and in the Town of DeWitt. At that time the sole school in the district was also acquired by the City of Syracuse. The laws also provided that the remainder of district No. 6 not annexed to the City of Syracuse "shall remain separate and distinct school districts as now

constituted until changed according to law" and that the City of Syracuse, upon request, would grant permission to children residing in the unannexed portions of district No. 6 to attend its schools without payment of tuition therefor. In the Court of Appeals appellants taxpayers and Board of Trustees of district No. 6 argued that the Commissioner of Education lacked power to include district No. 6 in a new school district; that such inclusion could only be effected by an act of the Legislature because of chapters 518 and 626 of the Laws of 1926; that the Legislature did not delegate to the Commissioner of Education authority to change the provisions of such chapters of the laws, and that the interpretation of the statutes by the lower courts was unconstitutional and deprived the residents of district No. 6 of the equal protection of the laws and of their property without due process of law. All appellants argued that, since there were no unmet educational needs in their districts and there would be no improvement in the educational facilities therein by inclusion in the new district, the Commissioner of Education lacked authority to absorb their districts into a new one and that the organization of the new school district was unconstitutional and deprived appellants of their property without due process of law.

Stewart F. Hancock, Jr., Benjamin E. Shove and Stewart F. Hancock for appellants.

Charles A. Brind, John P. Jehu, Elizabeth M. Eastman and George B. Farrington for respondent.

Order affirmed, without costs; no opinion.

Concur: Chief Judge Desmond and Judges Dye, Fuld, Froessel, Van Voorhis, Burke and Foster.

Remittitur of New York Court of Appeals as Amended.

COURT OF APPEALS

STATE OF NEW YORK, SS:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 5th day of January in the year of our Lord one thousand nine hundred and sixty-one, before the Judges of said Court.

WITNESS,
The HON. CHARLES S. DESMOND,
Chief Judge, Presiding.

RAYMOND J. CANNON, Clerk.

Remittitur January 5, 1961

No. 237

In the Matter of John W. Soergel, & ors., &c., *Appellants*,
and
Jack Macken, & ors., &c.,
Intervenors-Appellants
for the review and vacating or modification of an order granted and made by James E. Allen, as Commissioner of Education of the State of New York, &c.,
Respondent

BE IT REMEMBERED, That on the 7th day of July in the year of our Lord one thousand nine hundred and sixty, John W. Soergel, & ors., &c., the appellants, and Jack Macken, & ors., &c., the intervenors-appellants in this cause, came here unto the Court of Appeals, by Hancock,

Dorr, Ryan & Shove, their attorneys, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the Third Judicial Department. And James E. Allen, as Commissioner of Education of the State of New York, the respondent — in said cause, afterwards appeared in said Court of Appeals by Charles A. Brind, Jr., his attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. Stewart F. Hancock, Jr., of counsel for the appellants, and by Mr. Charles A. Brind, Jr., of counsel for the respondent —, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed, without costs. And thereafter a motion to amend the remittitur this remittitur is hereby amended by adding thereto the following: Upon the appeal herein their were presented and necessarily passed upon questions under the Constitution of the United States, as follows: Appellants contended that Chapters 518 and 626 of the Laws of 1926 and Article 37 of the Education Law of the State of New York as interpreted by the Commissioner of Education and construed by the Courts of this State denied them equal protection of the laws and deprived them of their property without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States. This Court held there was no such denial or deprivation.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be re-

mitted to the Supreme Court of the State of New York, there to be proceeded upon according to law.

THEREFORE, it is considered that the said order be affirmed, without costs, &c., as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

RAYMOND J. CANNON
Clerk of the Court of Appeals
of the State of New York

COURT OF APPEALS, CLERK'S OFFICE,)
Albany, January 5, 1961.)

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the
(SEAL) proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

RAYMOND J. CANNON
Clerk.

APPENDIX B.

TEXT OF LAWS, 1926, C. 518, C. 626.

CHAPTER 518

AN ACT to provide for extending the boundaries of the city of Syracuse by annexing thereto the territory comprised within the boundaries of the village of Eastwood by vote of the electors of such village and the consent of the mayor and common council of the city of Syracuse, to provide for the apportionment of school bonded indebtedness, the payment of village bonds and debts and the attendance at city schools of children residing in portions of school districts not annexed.

Became a law April 20, 1926, with the approval of the Governor. Passed by a two-thirds vote on emergency message.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Village of Eastwood annexed.

Section 1. Subject to the provisions of section seven of this act, all the territory comprised within the boundaries of the village of Eastwood in the county of Onondaga, as hereinafter described, is hereby annexed to and shall form a part of the city of Syracuse, namely

VILLAGE OF EASTWOOD

All that part of military lots numbers twenty-nine, forty, forty-one and forty-nine in the town of Dewitt, county of Onondaga and state of New York, bounded and described as follows: Beginning in the west line of military lot twenty-nine, three hundred and seventy-three and seventy-six one-hundredths feet north from the southwest corner thereof; thence south along the west line of military lots twenty-nine and forty, five thousand nine hundred and six and fifty-four one-hundredths feet to the south line

of the New York Central and Hudson River railroad lands; thence easterly along said south line of said railroad lands to a point in the prolongation south of the center line of Nichols street; thence southerly about five hundred and thirty-three feet continuing the direction of Nichols street to a monument in the blue line of the north blank of the former Erie canal; thence easterly one thousand four hundred and eighty-six and three one-hundredths feet along the blue line of the said Erie canal to a monument on the north bank of the said canal, thence northerly three hundred and four and sixty-five one-hundredths feet to a monument; thence easterly six hundred and twenty-seven and thirty-nine one-hundredths feet parallel with the blue line of the Erie canal to a monument and to the east line of military lot forty; thence northerly along the east line of said lot forty to the south line of the New York, West Shore and Buffalo railroad land; thence east along the south line of said railroad land one thousand four hundred and nineteen and sixty-one one-hundredths feet to a point in range with the center line of Boston Street; thence north in the direction of and along the said center line of Boston street to a point in range with the south line of lot one, block three thousand and ninety-five, if extended westerly; thence easterly along the south line of lot one, block three thousand and ninety-five, if extended and along the south line of block three thousand and ninety-five, and the prolongation of the same to the center line of Thompson road; thence northwest along the center line of Thompson road to a point opposite the north end of park A which point is in the extension of the north line of lot thirty, block three thousand and seventy-two; thence west in a straight line coinciding with the extension of the north line of lot thirty, block three thousand and seventy-

two to the northeast corner of said lot thirty; thence northerly along the easterly line of lot thirty-one of block three thousand and seventy-two to the northeast corner thereof; thence westerly along the northerly line of said lot thirty-one and its extension to the center line of L'Allemand street; thence southerly along the center line of said street to a point in the extension of the north line of lot thirty, block three thousand and seventy-two; thence westerly in the direction of the extended north line of said lot thirty to the extended center line of Hasbrouck street; thence northerly along the extended center line of Hasbrouck street to the north line of military lot forty-one; thence westerly along the north line of said lot to a point in the extended center line of Erickson street; thence northerly along the extended center line of Erickson street to a point three hundred and seventy-three and seventy-six one-hundredths feet north of the north line of military lot forty; thence westerly parallel to the north line of lot forty to the east line of the premises of the H. D. Dennison estate; thence northerly along the east line of said Dennison land to the northeast corner thereof; thence west along the north line of said Dennison land to the center line of Lamson street; thence northerly along the center of Lamson street and its extension thereof, to the southerly right-of-way line of the New York Central railroad; thence northwesterly along said right-of-way line to the west line of lands formerly owned by the Dennison estate; thence southerly along the westerly line of the lands of the said Dennison estate to a point eight hundred and forty-six and sixty-six one-hundredths feet northerly from the center line of James street; thence west parallel with the center line of James street eight hundred and thirty-nine and thirty-one one-hundredths feet to the center line of Midler

avenue; thence south along the center line of Midler avenue four hundred and seventy-two and nine-tenths feet to a point three hundred and seventy-three and seventy-six one-hundreds feet north of the south line of military lot twenty-nine; thence west parallel with south line of said lot twenty-nine, two thousand five hundred and forty-seven and fifty-five one-hundredths feet to the point of beginning.

To constitute part of 5th ward.

§ 2. The territory within the boundaries of such village, when annexed to the city of Syracuse shall constitute a part of the fifth ward of such city, and all the laws applicable to the city of Syracuse, not inconsistent with the provisions of this act shall apply to such territory. The municipal corporation of Eastwood shall cease and determine and all offices, positions and employments pertaining to the local government of such village are hereby abolished and the term of office of all officers elected or appointed in such village shall terminate. All unpaid taxes heretofore levied in such village and outstanding at the time this act takes effect shall be collected by the city of Syracuse, the same as though such village were a part of such city at the time such taxes were levied. The territory hereby annexed to the city of Syracuse shall cease to be a part of the union free school district number six and of union free school district number fourteen, respectively. The town of Dewitt, excluding the portion thereof hereby annexed to the city of Syracuse, shall remain a separate and distinct town. The remainder of union free school district number six, and of union free school district number fourteen not annexed to the city of Syracuse, shall remain separate and distinct school districts as now constituted until changed according to law. The board of education of the city of Syracuse shall upon request grant permis-

Village and officers terminated.

Unpaid taxes

Separation from union free school districts and town.

sion to children residing in the part of such school districts not annexed, to attend schools under the care and control of the board without the payment of any tuition therefor.

Bonded indebtedness of village and union free school districts.

§ 3. The bonded indebtedness, including principal and interest, of the village of Eastwood outstanding and unpaid shall be deemed the obligation of and be a charge upon and be paid by the city of Syracuse. The bonded indebtedness of union free school district number six and of union free school district number fourteen, including principal and interest, which exists at the time this act takes effect, shall be a charge upon and shall be paid [1] to the treasurer of each of such districts as the same shall become due and payable, in the same proportion to the whole bonded indebtedness of each such district as the assessed valuation of that portion of the district annexed bears to the whole valuation of such district, as shown by the last assessment roll of such school district.

Property and funds of village.

§ 4. All property, real and personal, belonging to the village of Eastwood shall, when such annexation takes place, belong to the city of Syracuse. All funds and sums of money held by the village of Eastwood or any officer thereof, shall be paid to the city of Syracuse and be received by such city in payment of the nineteen hundred and twenty-six city taxes of the inhabitants of such village to the city of Syracuse.

Boundaries; map.

§ 5. Within a reasonable time after such annexation, the city of Syracuse shall cause a survey to be made of the annexed territory, the boundaries of the same to be marked with monuments and a map of the city including the territory annexed to be made and filed in the Onondaga county clerk's office.

[1] "By the City of Syracuse" a part of the original bill, is omitted at this point.

Consent of mayor and common council.

§ 6. Notwithstanding the foregoing provisions of this act, the territory described in section one of this act, shall not become annexed to the city of Syracuse, nor shall any of the foregoing provisions of this act become operative, unless and until the consent of the city of Syracuse by its mayor or acting mayor and common council be obtained in the manner provided by law for the passage of local ordinances, such consent to be given or denied by such city authorities on or before the last Tuesday in June, nineteen hundred and twenty-six, and if such consent be given, unless and until the qualified voters residing in such annexed territory have decided in the affirmative by a majority vote of those voting, the following question, namely: "Shall the territory within the boundaries of the village of Eastwood be annexed to the city of Syracuse?" The board of trustee of the village of Eastwood shall call, in the manner provided by law, a special election of the qualified voters of such village to be held not later than the fourth Tuesday of July, nineteen hundred and twenty-six, at which such question shall be submitted. The trustees shall cause the necessary ballots to be prepared and the expense of the election shall be a charge against the city of Syracuse. At the close of the polls, the inspectors shall canvass the vote and make and certify returns thereof in triplicate, and shall cause one of such returns to be filed in the office of the village clerk, one in the office of the city clerk of the city of Syracuse and one copy in the office of the secretary of state, within ten days after such election. If a majority of the votes cast upon such election be in the affirmative, the territory comprised within the bounds of such village shall become upon such filing a part of the city of Syracuse.

Referendum election in territory to be annexed.

Ballots; expense.

Canvass; certification and filing of returns.

Effect of affirmative vote.

§ 7. This act shall take effect immediately.

CHAPTER 626

AN ACT to provide for extending the boundaries of the city of Syracuse by annexing a part of the town of Dewitt, to provide for the government of the annexed territory, the making of a survey, and a map of said territory, the payment of school bonded indebtedness and the apportionment of town bonded indebtedness.

Became a law April 23, 1926, with the approval of the Governor. Passed, by a two thirds vote on emergency message.

The People of the State of New York represented in Senate and Assembly, do enact as follows:

Certain described territory annexed

Section 1. Subject to the provisions of section six of this act, all that part of the town of Dewitt included within the following boundaries shall form a part of the city of Syracuse, namely:

All that part of military lots twenty-nine and twenty-eight in the towns of Dewitt and Salina, county of Onondaga, and state of New York, bounded and described as follows:

Beginning in the west line of military lot number twenty-nine, three hundred and seventy-three and seventy-six one-hundredths feet from the southwest corner thereof; thence east parallel with the south line of said lot number twenty-nine, twenty-five hundred and forty-seven and fifty-five one-hundredths feet to the center line of Midler avenue, thence north along the center line of Midler avenue four hundred and seventy-two and nine one-hundredths feet; thence east parallel to the center line of

James street, eight hundred and thirty-nine and thirty-one one-hundredths feet to a point in the westerly line of lands formerly owned by the Denison estate, which point is eight hundred and forty-six and sixty-one one-hundredths feet northerly from the center line of James street; thence northerly along the westerly line of said land of Denison estate to the southerly right of way of the New York Central railroad; thence northwesterly along said railroad right of way to the easterly prolongation of the north line of the Lavonia and Highland park tracts; thence westerly along the said easterly prolongation of and the north line of, the Lavonia tract and Highland park tract to the east line of James street terrace tract; thence northerly along said east line of James street terrace tract to the north line of Oak court of the James street terrace tract; thence westerly along the north line of Oak court and the north line of lot number four hundred and eighty-three of James street terrace tract and the north line of lots six hundred and thirty-nine, seven hundred and four, seven hundred and thirty-nine and five hundred and eighty-eight of the James street terrace annex tract, and the north line of lots twenty-eight, thirty-three, eighty-four, eighty-nine, one hundred and twenty eight, one hundred and thirty-three and one hundred and seventy-two of the Wilson park tract, and the north line of lots seven hundred and twenty-four five hundred and ninety-four, five hundred and eighty-five. four hundred and fifty-one, four hundred and forty-two, three hundred and four, seven hundred and ninety five, two hundred and forty one, two hundred and thirty-two, one hundred and seventy-two, one hundred and sixty-three and ninety-seven of the Syracuse gardens tract and along the westerly prolongation of said lots in the Syracuse gardens

tract to the present easterly line of the city of Syracuse; thence southerly along said easterly city line to the north line of lots ten and eleven of the Melrose part * tract as filed in the county clerk's office of Onondaga county, June seventh, nineteen hundred and twelve; thence easterly along said lots ten and eleven to the westerly line of Amelia street; thence easterly across Amelia street, to the north line of lots seven, eight and nine of said Melrose park tract; thence easterly along the north line and prolongation thereof, of lots seven, eight and nine to the west line of plot "A," Gaister's homestead; thence southerly along said west line to the north line of the Salt Springs reservation; thence easterly along the north line of said reservation to the northeast corner thereof, and the southeast corner of military lot twenty-eight; thence southerly along the westerly line of military lot twenty-nine to the point of beginning.

To constitute part of 4th ward.

§ 2. The territory above described, when annexed to the city of Syracuse, shall constitute a part of the fourth ward of such city, and all the laws applicable to the city of Syracuse, not inconsistent herewith, shall apply to such territory.

Officers of town resident in such territory, continued.

Any person elected or appointed to any office in the town of Dewitt, even though a resident of the territory so annexed, shall continue to hold and shall exercise and perform the duties of his office in such town during the term for which elected or appointed and shall receive the salary, pay, fee or other emoluments of his office during his incumbency.

Unpaid taxes.

All unpaid taxes heretofore levied against said annexed territory and existing at the time this act takes effect, shall be due and payable and collected in all respects the same as if the law had not been enacted.

* So in original. [Evidently should be "park."]

Bonded indebtedness of school districts and of town.

§3. The bonded indebtedness of union free school district number six, including principal and interest, which exists at the time this act takes effect, shall be a charge upon and be paid by the city of Syracuse to the treasurer of such school district as the same shall become due and payable, in the same proportion to the whole bonded indebtedness of such school district as the assessed valuation of the portion annexed bears to the whole school district, as shown by the last assessment roll of such school district and the bonded indebtedness of the town of Dewitt, including principal and interest, which exists when this act takes effect, shall be a charge upon and shall be paid by the city of Syracuse to the supervisor of such town as the same shall become due and payable, in the same proportion to the whole bonded indebtedness of such town as the assessed valuation of the portion annexed bears to the whole assessed valuation of such town, as shown by the last assessment-roll of the town of Dewitt.

Property and funds of town and of school district.

§4. All property, real and personal, belonging to the town of Dewitt or to such school district, within the territory annexed shall belong to the city of Syracuse. All funds and sums of money held by the town of Dewitt or any officer thereof to the credit of such school district shall be paid to the city of Syracuse, in the same proportion as the assessed valuation of the portion annexed bears to the valuation of the whole school district, as shown by the last assessment-roll of such district, and be applied by such city in payment of charges against such school district. All funds and sums of money held by the town of Dewitt or any officer thereof to the credit of such town shall be paid to the city of Syracuse, in the same proportion, as the assessed valuation of the territory annexed

bears to the whole assessed valuation of such town, as shown by the last assessment-roll of the town of Dewitt, and by said city be duly received in payment of the nineteen hundred and twenty-six city taxes of the inhabitants of the territory annexed to the city of Syracuse.

Boundaries: map.

§ 5. Within a reasonable time after such annexation, the city of Syracuse shall cause a survey to be made of the annexed territory, the boundaries of the same to be marked with monuments and a map of the city including the territory annexed to be made and filed in the Onondaga county clerk's office.

Separation from town and school districts.

§ 6. The territory hereby annexed to the city of Syracuse shall cease to be a part of the town of Dewitt, or of the school districts in which such territory is now located. The town of Dewitt, excluding the portions thereof hereby annexed, shall remain a separate and distinct town. The remainder of union free school district number six, not annexed to the city of Syracuse, shall remain separate and distinct school districts as now constituted until changed according to law.

§ 7. This act shall take effect immediately.

N. Y. Education Law, Article 37, Section 1801.

1. The commissioner of education is hereby authorized and empowered to lay out central school districts for the establishment of central schools to give instructions in elementary or elementary and high school subjects and to fix, determine and define the boundaries of said districts as hereinafter provided.

2. The commissioner is authorized and empowered to make and enter in his office orders laying out territory in new central school districts or annexing to existing central school districts territory not contained within a city school district in a city having a population of more than ten thousand inhabitants, and not contained within a city school district having a full valuation of taxable real estate per public school pupil residing in the district of more than fifteen thousand dollars; provided, however, that no territory contained within a city school district in a city having a population of ten thousand inhabitants or less may be included in new central school districts or annexed to existing central school districts after July first, nineteen hundred fifty-five. The commissioner of education is authorized and empowered to make and enter in his office orders dissolving and annexing a central school district or districts to another central school district, pursuant to the provisions of subdivision two of section eighteen hundred two of this chapter. The commissioner in laying out such central school districts and on fixing and defining the boundaries thereof shall include only territory of suitable size conveniently located for the attendance of pupils and having a sufficient number of pupils for the establishment of a central school. The commissioner shall designate all central school districts by name, number, and such other description as he shall deem proper.

3. Within ten days after the making and entry of the order pursuant to this section, the commissioner shall transmit a certified copy thereof to the clerk, or in the event there is no clerk, to the trustee or trustees of each school district the territory of which is affected by said order. The clerk, the trustee or trustees, as the case may be, shall, within five days after receipt of such order, post a copy thereof in five conspicuous places in such district.

4. No central school district laid out by order of the commissioner shall operate as a central school district, not be entitled to receive the benefits of a central school district until it has been organized by the qualified voters of the district in accordance with the provisions of this article, provided, however, a central school district which was organized prior to April seventh, nineteen hundred forty-four, or pursuant to the provisions of this section and to which territory may be annexed shall not be required to again organize.

Constitution of the United States.

AMENDMENT XIV

Section 1. * * * nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *.

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SUPREME COURT, U. S.

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FILED
JUN 23 1961
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, 1961

No. 117

In the Matter
of
JOHN W. SOERGEL, THOMAS MAFRICI, LEO R. PRIEST, THOMAS CRANDALL, CARMEN FERRANTE, CHARLES TEDESCO and the BOARD OF TRUSTEES OF UNION FREE SCHOOL DISTRICT NO. 6,

Appellants,

vs.

JAMES E. ALLEN, as Commissioner of Education of the State of New York,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION TO DISMISS APPEAL

CHARLES A. BRIND
Attorney for Appellee
State Education Building
Albany, New York

Of Counsel:
JOHN P. JEHU
ELIZABETH M. EASTMAN
GEORGE B. FARRINGTON

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

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IN THE

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Appellants,

vs.

JAMES E. ALLEN, as Commissioner of Education of the State of New York,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION TO DISMISS APPEAL

The appellee, James E. Allen, as Commissioner of Education of the State of New York, hereby moves to dismiss the appeal herein.

The ground for appellee's motion to dismiss the appeal is:

> The appeal herein does not present a substantial federal question.

Pertinent Statutes

The following sections of the New York State Education Law are pertinent to this cause:

Section 1801, subdivisions 1 and 2

"1. The commissioner of education is hereby authorized and empowered to lay out central school districts for the establishment of central schools to give instruction in elementary or elementary and high school subjects and to fix, determine and define the boundaries of said districts as hereinafter provided.

"2. The commissioner is authorized and empowered to make and enter in his office orders laying out territory in new central school districts or annexing to existing central school districts territory not contained within a city school district in a city having a population of more than ten thousand inhabitants, and not contained within a city school district having a full valuation of taxable real estate per public school pupil residing in the district of more than fifteen thousand dollars; provided, however, that no territory contained within a city school district in a city having a population of ten thousand inhabitants or less may be included in new central school districts or annexed to existing central school districts after July first, nineteen hundred fifty-five. The commissioner of education is authorized and empowered to make and enter in his office orders dissolving and annexing a central school district or districts to another central school district, pursuant to the provisions of subdivision two of section eighteen hundred two of this chapter. The commissioner in laying out such central school districts and in fixing and defining the boundaries thereof shall include only territory of suitable size conveniently located for the attendance of pupils and having a sufficient number of pupils for the establishment of a central school. The commissioner shall designate all central school districts by name, number and such other description as he shall deem proper."

Section 1804, subdivisions 5 and 6

"5. Nothing herein contained shall be construed to deprive any existing school district of the property belonging to such district, or to affect the indebtedness of said district. An existing district within the meaning of this article shall be construed to mean a district that lies within the boundaries of a central school district. Each such existing district shall be deemed to continue to exist in law for the purpose of paying all its just debts, including obligations lawfully issued prior to the organization of such central school district, together with all interest thereon as the same shall fall due. In levying the annual school tax upon the property of such central school districts, the board of education shall also assess and levy upon the taxable property of each such existing district which has an outstanding indebtedness, and additional sum sufficient to pay all of such indebtedness which shall fall due during the school year for which the tax is levied less any sum received by such central school district and apportioned and credited to the existing school district pursuant to the provisions of subdivision four of section eighteen hundred six of this article."

"6. The board of education shall not sell or otherwise dispose of the property of any such existing district except with the approval of a majority of the qualified voters of such existing district present and voting upon the question at a meeting of such voters duly called by such board of education; provided, however, that upon the expiration of five years from the date of discontinuance of a school, pursuant to section one thousand eight hundred five of this chapter, the board of education may, in its discretion, without a vote by such qualified voters upon such question, sell or otherwise dispose, in the manner provided by law, of such a school or other building previously used for school purposes and the real property on which it is situated. For that purpose the proceeds of such sale or disposal of property belonging to such existing district, after deducting the cost of repairs or improvements made after the organization of the central school district, shall be used for

the payment of the portion payable by such existing district of any outstanding indebtedness of such existing district which shall be due and payable or which may thereafter become due and payable. Any balance remaining after the payment of such indebtedness shall be apportioned among the taxpayers of such existing district as they appear upon the last completed town or city assessment roll preceding the date of sale, unless the voters of such existing district by a majority vote of those present and voting at a special district meeting called for that purpose shall vote to turn over the proceeds of such sale or disposal of such property to the central district to be used for the benefit of the central district. Any balance of funds remaining in the treasury of the several districts included within the central school district on July first next following the date of the establishment of such central school district, after paying all outstanding obligations then due and payable, shall be turned over to the treasurer of the central school district within thirty days thereafter and shall become available for use by the board of education of the central school district; provided, however, that if any such existing district shall have any obligations which shall become due and payable after such July first, so much of any such balance of funds as may be necessary shall be held in a special account by the treasurer of the central school district for the purpose of paying the principal of, and interest on, such obligations, as the same shall become due and payable from time to time. The title to all property erected or otherwise acquired after the organization of such central school district shall be vested in the central district, irrespective of the location of such property."

Section 1805

"§ 1805. Limitation of powers of central school district

All central school district shall have the same powers and be subject to the same limitations that are now conferred or imposed by law upon union free school districts as provided by this chapter except that in

each existing district maintaining a school at the time of centralization the central school district shall continue to maintain such school for the instruction of pupils therein up to and including the sixth elementary grade for a period, commencing on the day of centralization, of not less than five years, unless the legal voters of such existing district at a meeting of such voters duly called by the board of education of such central school district shall, by majority vote of those present and voting at such meeting, determine to discontinue the school in such existing district prior to the expiration of such minimum five year period and in such case the school shall be discontinued accordingly. At any time after the expiration of such minimum five year period the board of education of the central school district may, by a majority vote of the members thereof, discontinue such school in such existing district, provided, however, that in the event the legal voters of such existing district shall have determined not to discontinue such school at a meeting of such voters duly called upon such question, the board of education of the central school district may not discontinue such school until after the expiration of a period of five years following such determination by such legal voters. The district officers of the several existing districts shall remain in office until August first next following organization of such central school district for the purpose of conducting and maintaining school in the several districts, the carrying out of contracts in force at the time of the organization of such central school district, of paying all just debts and obligations of such existing districts due and payable on or prior to said August first, and of levying and collecting taxes raised or necessary to be raised for any of said purposes. For the purposes of the apportionment and payment of public moneys, notwithstanding any other provisions of this article, any apportionments and payments made during the school year in which such central school district was organized shall be apportioned and credited to the existing districts. Any apportionments made and paid during the school year next succeeding the date of the organization of such central school district shall be made

and credited to the central school district but the amounts thereof shall be determined upon the basis of the continuance of the existing districts as separate districts during the entire school year in which such central school district was organized."

Section 1806

"1806. State aid building quota

1. Any central school district organized under the provisions of this article shall from the time of its organization receive from the state, in addition to the apportionments provided in sections thirty-six hundred two, thirty-six hundred three, thirty-six hundred twenty-seven and forty-four hundred five of this chapter, an apportionment to be known as a building quota, the amount of which shall be determined according to the cost of the building, including site purchase, grading and improvement of site, original furnishings and equipment, machinery and apparatus, professional fees and other incidental expenses, which cost shall be approved by the commissioner, as calculated in this subdivision, provided that any building quota established prior to July first, nineteen hundred fifty-five, shall continue to be computed and paid pursuant to the provisions of this chapter as in effect at the time of the establishment of such quota.

"a. For the purpose of calculating the building cost, which shall be known as the 'ceiling' the commissioner shall ascertain the number of pupils enrolled in grades one to twelve, inclusive, of the central school district, or, where a building quota is to be established during the first year of operation of the central school district, the number of public school pupils of the existing districts comprising such central school district, enrolled in such grades, at the close of the school year next preceding the date the work is commenced and shall add thereto, as a computed kindergarten enrollment, a number of pupils equal to the average number of pupils enrolled in grades one to six, inclusive, in such school districts. The pupil enrollment thus enumerated may be increased or decreased five

per centum by the commissioner to compensate for school population trend in each central district just prior to the approval of a bond issue for a central school building.

"b. (1) Upon the basis of the pupil enrollment thus ascertained, there shall be computed for each pupil shown thereby the sum of twelve hundred dollars plus an amount not exceeding two hundred forty dollars per pupil on account of the cost of the site purchase, grading and improvement of site, original furnishings, equipment, machinery and apparatus, professional fees and other incidental costs approved by the commissioner, as a cost unit for buildings housing grades kindergarten through six, and the sum of sixteen hundred dollars per pupil plus an amount not exceeding four hundred dollars per pupil on account of the cost of such incidental expenses, as a cost unit for buildings housing grades seven through twelve, provided, however, that the sum of sixteen hundred dollars shall be so computed without the additional allowance for such incidental expenses in case of such latter buildings if the district is scheduled for reorganization in accordance with the master plan for school district reorganization of the joint legislative committee on the state education system, as amended by the commissioner, and until such reorganization is accomplished. The pupil enrollment multiplied by the cost unit shall constitute the cost of the building in a central school district. The cost unit herein specified, except for the additional allowance for incidental expenses shall be based upon the cost of material and labor on July first, nineteen hundred fifty-five, and may be increased or decreased by the commissioner in proportion to the fluctuation in the costs of material and labor after July first, nineteen hundred fifty-five. Schedules indicating such fluctuations, expressed in percentage terms of increase or decrease in the basic cost unit of twelve hundred dollars or sixteen hundred dollars, as the case may be, shall be prepared by the state industrial commissioner monthly and delivered to the commissioner. (2) A building quota for additional construction in a district in which a building quota shall theretofore have been established shall be

computed as follows: after computing the building quota pursuant to paragraph a and subparagraph (1) of paragraph b and paragraph c of this subdivision and after ascertaining the raw building quota percentage by dividing the building quota by the ceiling, all previous ceilings, or, where the costs allowed were less than such ceiling, such costs, shall be recomputed in terms of the dollar value of the cost unit as of the time of the establishment of the building quota for the additional construction. Such previous ceiling or such approved costs allowed, as so recomputed, shall be deducted from such ceiling in determining the final quota percentage for the additional construction. In the case of approved costs for building quotas established prior to May second, nineteen hundred forty-one, such costs shall be adjusted by multiplying them by the ratio of the dollar value of the cost unit at the time of the additional construction to the dollar value of the cost unit as of May second, nineteen hundred forty-one.

"c. The central school district shall contribute to the cost of the building and incidental expenses thus calculated, an amount equal to six per centum of the actual value of taxable property in the central district and the state shall contribute the remainder of such cost, thereby making the building quota to be apportioned and paid by the state the amount obtained by multiplying pupil enrollment by cost unit minus six per centum of the actual value of taxable property.

"d. Notwithstanding the provisions of paragraphs b and c of this subdivision, any central school district, for which a new building quota is to be established after July first, nineteen hundred fifty-five, and in which school construction has been or shall be approved pursuant to law and the general construction contract therefor awarded prior to July first, nineteen hundred sixty-two, shall have the right to have its building quota computed under the provisions of former section eighteen hundred six of this chapter as in effect on June thirtieth, nineteen hundred fifty-five and in the following manner:

"(1) A raw building quota percentage shall be computed as if construction had begun during the school year nineteen hundred fifty-four—fifty-five, using the enrollment as of the end of June of nineteen hundred fifty-four, the actual valuation used in the computation of regular state aid for the school year nineteen hundred fifty-four—fifty-five, and the dollar value of the cost unit as of June, nineteen hundred fifty-five:

"(2) thereupon a new ceiling shall be computed based upon the date on which construction actually began;

"(3) the ceiling so computed shall be the new ceiling, except in a district in which a building quota shall theretofore have been established, in which case the ceiling so computed shall be used to determine the balance of ceiling. Such ceiling, or balance of ceiling, as the case may be, shall then be used to adjust the raw building quota percentage determined in accordance with subparagraph (1) of this subdivision.

"e. The actual value of taxable property shall be ascertained by taking the assessed valuation of such real property as it appears upon the last assessment roll of the town or city in which such property is located, after revision as provided by law, and by applying thereto the ratio, as determined by the state board of equalization and assessment, which such assessed valuation bears to the actual value of such property.

"f. The building cost as herein computed shall not prohibit a central district from exceeding the computed building cost, but any increase shall be borne by the local district.

"g. If a central school district decides to plan for only a part of the enrollment, either in a new building or in an addition to an existing building, the building formula shall be applied except that the local district and state shall contribute in terms of the ratio established if the entire enrollment had been planned. If the entire enrollment is not planned in the initial outlay, that shall not prohibit the district on some future

date from receiving state assistance for various buildings or additions for the enrollment beyond the enrollment already cared for. Under no circumstances shall the state contribute more than its share that would result from the building formula prescribed in this subdivision.

"h. In the event that federal aid shall be granted to any school district in the construction of any school building, the amount of such federal aid shall not be included in the sum actually expended in computing the amount of such building quota.

"i. The building quota herein provided for shall be paid only on projects costing more than thirty-five hundred dollars and only in case the commissioner of education shall approve the proposed erection, enlargement, remodeling or repair of school buildings in advance of the expenditure of the sum required therefor, and in case the plans and specifications for such erection, enlargement, remodeling or repairs shall be approved by him as provided by law.

"j. The board of education of such central school district shall cause to be presented to the commissioner of education, in the manner and at the time required by him, a statement as to the amounts expended by such district for the erection, enlargement, remodeling or repair of school buildings.

"2. In the event that a school district acquires a school building by gift or otherwise without cost to the district, and the plans and specifications of such building have been approved by the commissioner of education, such commissioner shall apportion to such district a building quota computed according to the building formula prescribed in subdivision one of this section as approved and determined by such commissioner. The board of education of such district and its successors shall hold such quota in trust, invest and reinvest the same in obligations of the state of New York, of the United States and/or obligations of counties, cities, towns and villages of this state, which have not defaulted in the payment of any of their obligations, either as to principal or interest,

within five years next preceding the investment and use the income therefrom for the care and maintenance of such school building and the school grounds upon which it is located.

"3. If the cost of the erection, enlargement, remodeling or repair of school buildings is paid out of the proceeds of bonds or other evidences of indebtedness issued as provided by law, such building quota shall continue to be paid, for the year for which the apportionment is made, on the basis of the amount of the principal and interest of such bonds or evidences of indebtedness paid by such district during such year, where it has so been paid on and before July first, nineteen hundred fifty-six; provided, however, that in all other cases the apportionment of such building quota based on bond or capital note issues, shall be paid during the school fiscal year in which the installment of principal and interest on which such quota is based falls due. Receipts from the building quota shall be applied first to the payment of the principal and interest which becomes due on such bonds in the year in which the quota is received.

"For the purposes of this section the payment of bond anticipation notes made by a central school district from a budgetary appropriation shall, for the apportionment of such building quota, be deemed to be a payment of bonds in anticipation of which the said notes were issued, providing that the total amount of bonds issued and sold by such central school district shall be reduced by an equivalent amount.

"4. There shall also be paid to each central school district containing a school district which continues to exist after becoming a part of such central school district, pursuant to the provisions of section eighteen hundred four of this chapter, for the purpose of paying any outstanding indebtedness incurred by it prior to July second, nineteen hundred forty-seven, a sum of money equal to the amount necessary to pay such indebtedness of such school district, including interest, which shall fall due during such school year, less two mills on each dollar of actual valuation of the taxable property in such existing district. The first payment

to central school districts hereafter organized shall be made for and during the first school year for which the board of education of the central school district levies a tax. The central school district shall apportion and credit to the existing school district the sum so received."

Section 1514

"§ 1514. Property of districts consolidated

"When two or more districts shall be consolidated into one, the new district shall succeed to all the rights of property possessed by the annulled districts."

Section 1517

"§ 1517. Indebtedness of certain dissolved districts

"Whenever any school district is dissolved pursuant to the provisions of section fifteen hundred five of this article and annexed to an adjoining district or adjoining districts or consolidated as provided in section fifteen hundred twelve, the indebtedness of any such district evidenced by bonds or notes or relating to school building construction shall thereupon become a charge upon the enlarged district formed by such annexation or consolidation. The board of education or trustees of such enlarged district shall raise by tax an amount sufficient to pay any such indebtedness of such district as the same shall become due."

Section 1518

§ 1518. Continuance of dissolved districts for payment of debts

"Though a district be dissolved, it shall continue to exist in law, for the purpose of providing for and paying all its just debts, except as provided in section fifteen hundred seventeen; and to that end the trustees and other officers shall continue in office, and the inhabitants may hold special meetings, elect officers to supply vacancies and vote taxes; and all other acts necessary to raise money and pay such debts shall be done by the inhabitants and officers of the district."

Section 314

"§ 314 Master Plan For School District Reorganization

"The commissioner of education is hereby authorized to continue the investigations, study and review carried on by the joint legislative committee on the state education system in order to bring up to date the Master Plan For School District Reorganization (legislative document number twenty-five of nineteen hundred forty-seven); to make such studies and surveys as are necessary to review periodically and maintain such plan currently; to hold hearings in relation to affected areas for the purpose of eliciting the expression of opinion, cooperation and assistance of the inhabitants of such areas; and to make recommendations for school district reorganization so as to assure the most efficient and economical provision of educational facilities for such areas. Such recommendations shall be principally directed toward the reorganization of areas in and around the city school districts of cities having less than one hundred twenty-five thousand inhabitants, the reorganization of the remaining common and union free school districts not included in such urban and suburban areas and the reorganization of the smaller central school districts. The commissioner of education is hereby authorized, further, to amend such master plan as established by such joint legislative committee on the basis of his investigations, study and review, by orders made by him and entered in his office. Nothing herein contained shall delay, or interfere with, the exercise of the powers of the commissioner of education vested in him by articles thirty-seven or forty or sections fifteen hundred twenty-four, fifteen hundred twenty-five or fifteen hundred twenty-six of the education law."

Chapter 518 of the Laws of the State of New York of 1926, so far as pertinent to the present case, provides for the annexation of certain territory formerly part of School District No. 6 of the Town of DeWitt to the City of Syracuse and specifically further provides:

> "The territory hereby annexed to the city of Syracuse shall cease to be a part of the union free school district number six and of union free school district number fourteen, respectively. * * * The remainder of union free school district number six, and of union free school district number fourteen not annexed to the city of Syracuse, shall remain separate and distinct school districts as now constituted until changed according to law. The board of education of the city of Syracuse shall upon request grant permission to children residing in the part of such school districts not annexed, to attend schools under the care and control of the board without the payment of any tuition therefor. * * *"

Chapter 626 of the Laws of the State of New York of 1926 so far as pertinent to the present case provides in part as follows:

> "The territory hereby annexed to the city of Syracuse shall cease to be a part of the town of DeWitt, or of the school districts in which such territory is now located. * * * The remainder of union free school district number six, not annexed to the city of Syracuse, shall remain separate and distinct school districts as now constituted until changed according to law."

Statement of Facts

This proceeding was brought under Article 78 of the New York Civil Practice Act. The appellants sought therein to set aside an order of Appellee Commissioner of Education laying out Central School District No. 1 of the Towns of DeWitt, Manlius and Cicero, Onondaga County and Sullivan, Madison County, dated June 19, 1957 and issued pursuant to Section 1801 of the New York State Education Law. The Central School District laid out by this order included fifteen existing school districts among which was School District No. 6 of the Town of DeWitt.

The Commissioner of Education who is charged by statute with the duty of enforcing all general and special laws relating to the state education system, and specifically under Section 1801 of the Education Law, with the duty and authority to lay out Central School Districts and determine their boundaries, took such action after exhaustive study of the educational system in this area (R. 201 *et seq.**).

During the years 1942-47 reorganization of school districts within New York State was studied by the Joint Legislative Committee on the State Education System. The final report of that Committee (legislative document 1947, No. 25, page 517) recommended the organization of a central school district including substantially the territory of the districts set forth in the Commissioner's order. The report of the Joint Legislative Committee while standing as a recommendation and guide to the Commissioner was, of course, not inflexible. As conditions changed the Commissioner was authorized to use discretion in acting. The deviations in this case, however, were minor and had no substantial effect. One school district originally scheduled for inclusion in the said central district, *viz.*, common school district No. 5 of the Town of Cicero, was annexed to the North Syracuse Central District during the years when action on the proposed central school district here under consideration was pending. Prior to the time that the order of centralization here in question was made, common school district No. 8 of the Town of Sullivan was added. Three districts which the Joint Legislative Committee recommended be included, *viz.*, common school districts Nos. 1, 2 and 3 of the Town of DeWitt were in the meantime con-

* Unless otherwise stated, figures in parentheses refer to Folios of Record on Appeal to the Court of Appeals.

solidated as District No. 3 (205). The territory embraced within District No. 3, DeWitt as included in the order of centralization of 1957 therefore included the territory of Districts 1, 2 and 3, DeWitt as set forth in the report of the Joint Legislative Committee in 1947.

The legislature recognized, of course, that with the passage of time and changing conditions, amendments to the original plan would be required. In 1956 the legislature directed the Commissioner (Education Law, Section 314) to carry on further studies and to amend and bring up to date the Master Plan for school district reorganization adopted as a result of the legislative study and in September of 1958 the Master Plan was so amended and in respect to the territory here in question, provided for the organization of a central school district to include the territory in question (206-208). *District No. 6 of the Town of DeWitt has been at all times included in the proposed centralization as recommended by the Joint Legislative Committee in 1947 and, of course, in the amended Master Plan.* The entire reorganization, in addition, is in keeping with the recommendations both of the Joint Legislative Committee and the findings upon the studies made by the Department at legislative direction for bringing the Master Plan to date.

Following the customary procedures leading to the reorganization of school districts, studies were made of the educational needs of the community on several occasions over a period of years between 1947 and 1957 (301-399). In these studies members of the staff of the State Education Department participated with residents of the local area. The available school facilities, enrollment of various districts and their needs were considered and after this exhaustive study and expressions of views by residents of

the area, the Commissioner concluded in 1957 that the reorganization should not be delayed any further in view of the increasing educational needs of the area.

Following the centralization order of June 10, 1957 this proceeding was started.

At the referendum held in June of 1957, at which the voters of the proposed central school district voted on the question of whether or not to organize the said central school district, such proposal was defeated (R. 215, see also Special Term Exhibit 6). Pursuant to the provisions of the Education Law, the order remained valid for a period of two years. A subsequent referendum is provided for upon the submission of petitions containing the required number of signatures of voters of the area (Education Law, section 1803, subdivision 8). In March of 1959 new petitions were filed, properly signed, requesting such a further referendum (Special Term Ex. 7). This referendum was held on April 25, 1959. The Board of Canvass appointed for the purpose of canvassing the votes at such meeting duly reported that the resolution to organize the central school district was carried by a vote of 2731 in favor of the resolution to 2683 opposed, with 86 void ballots (Special Term Ex. 9). Thereupon, this proceeding, which had been held in abeyance following the first referendum, was returned to the calendar of the court and argued, before Honorable William Deckelman, Justice of the Supreme Court, at Special Term, on May 22, 1959. The decision of the Supreme Court upheld the order of the Commissioner (R. 274-294).

An appeal was taken to the Appellate Division of the Supreme Court which unanimously affirmed the decision (10 A. D. 2d 767, 197 N. Y. S. 2d 635). The appellants

appealed to the Court of Appeals which unanimously affirmed the decision (9 N. Y. 2d 633, 210 N. Y. S. 2d 233).

ARGUMENT

The appeal herein does not present a substantial federal question.

It is recognized that education is one of the functions reserved to the states under the Constitution of the United States. It is respectfully submitted that the finding of any substantial federal question in this case is foreclosed by a multitude of prior decisions of the Federal Courts and particularly of this Court which have already determined the issues purported to be raised herein by appellants.

In the Matter of the *Board of Education of Union Free School District No. 3 of the Town of Oyster Bay etc.* v. *Allen* (361 U. S. 535) this Court dismissed an appeal in similar circumstances for lack of a substantial federal question. That case was essentially on all fours with the present proceeding in that individual taxpayers and the Board of Education of Union Free School District No. 3 of the Town of Oyster Bay had instituted a proceeding to set aside an order of the Commissioner of Education made under Section 1801 of the New York State Education Law including such district in a Central School District. Petitioners in that case likewise contended that the inclusion of their district in the Central School District would result in increased taxation and that as residents of that district they would not receive direct benefit from such increased taxation, it being their contention that their district could without such increased taxation continue to supply its own educational facilities.

There is no substantial difference between that proceeding and the present proceeding. The special acts of the New York State Legislature of 1926, Chapters 518 and 626, referred to by petitioners, do not prevent reorganization of School District No. 6 of the Town of DeWitt since by express language they provide that said School District No. 6 of the Town of DeWitt shall remain a separate school district "until changed according to law". The Legislature with due regard for procedural safeguards has provided a means whereby school district boundaries may be changed by the formation of Central School Districts, *viz.* Section 1801 *et seq.* of the New York State Education Law. The reorganization of this district has been carried out in accordance with the procedures set forth therein and in the regular course of customary procedures leading to such reorganizations and the establishment of Central School Districts.

Contrary to the appellants' argument, the construction of the annexation acts, Chapters 518 and 626 of the Laws of 1926, for which appellants contend would render such acts unconstitutional because such construction would result in a discriminatory exemption of taxpayers of this comparatively small "island" from local real estate taxes to support an adequate system of education. Appellants point out repeatedly that in 1926 when the annexation acts were passed certain bonds were outstanding which were continued to be paid off by District No. 6 (the final payment of $6,000 of such debt fell due during 1960), but it should be pointed out that at that time when most taxpayers of the state were feeling the increased burden of cost of education to meet the challenge of the era, taxpayers of District No. 6 paid school tax on real property at the rate of $.50 for each thousand dollars of assessed

valuation (R. 232-234). Neighboring districts paid rates as high as $44.36 per thousand dollars of assessed valuation.

We submit that the taxpayers of such other school districts are being deprived of their property without due process of law if appellants' contentions were to be followed. The tax rate which the appellants' district had in 1959 included payment of an annual installment of the debt incurred prior to 1926 which is now fully paid leaving the district in an even more favorable tax position.

Contrary to appellants' argument that the inclusion of School District No. 6 in the Central School District is of no benefit to residents of that district, it should be pointed out that such inclusion will make available to pupils of this district the right to attend schools of the district in which they reside when the Central School District is functioning, a district in which the parents of such pupils will be voters and have a voice in the selection of board members, authorization of new school buildings and determining the kind of school system which they want for their children. Presently, the pupils living in District No. 6 attend the schools of the City of Syracuse as nonresidents. Their parents have no vote in any school matters. The children can be shifted from building to building to suit the convenience of the City School District. It goes without saying that there is a definite educational advantage for them in being in a position to attend schools which are an integral part of a school system in their own district with a continuous program designed for their needs rather than to continue to attend city schools on sufferance as nonresidents. Of course, if for any reason the pupils should elect to attend Syracuse schools, their right to do so would not be affected by the centralization.

The fact that School District No. 6 continued to pay a proportionate amount of bonded indebtedness which existed in 1926 and which has now been completely paid, creates no different situation from that of any existing school district which is included in a Central School District and which has a prior incurred indebtedness (Education Law, Section 1804, subdivision 5).

Appellants argue that the local school tax is in the nature of a local benefit or improvement assessment. This, of course, is not the case. The New York State Constitution mandates the maintenance of a system of free common schools (New York State Constitution, Article II, Section 1). The system is a state education system and is supported by a combination of State and local taxation. If schools are purely a local benefit as appellants claim, then statewide taxation to support local schools would be likewise improper.

The Legislature of New York State has recognized the principle that in order to avoid inequality in local taxation it is necessary in all cases to include in reorganized school districts territory of sufficient size and wealth to provide adequate support in the form of local taxation so that so far as possible the burden is equal for all taxpayers. The principle has been established by the Legislature and within statutory and procedural limits the Commissioner has carried out his duties as outlined by the Legislature in respect to reorganization including the present case to lay out an area, where reorganization is needed, which has adequate resources to support its schools. That is not to say as appellants argue that the "Commissioner determines that one district is not paying enough tax". If reorganization was not a necessity School District No. 6 could continue alone indefinitely but the needs of the state

system of education must dictate the Commissioner's action in relation to reorganization.

During the years following the making of the Commissioner's order in 1957 time and the population explosion have not stood still. The area in question desperately needs additional educational facilities. Over a thousand children in these districts are presently being housed in temporary classrooms in rented buildings. The appellants have had every opportunity to present their arguments to the state courts and it is submitted that the district should not be further prevented from going forward as reorganized, to solve its educational problems.

The constitutionality of New York State Education Law, Section 1801, has heretofore been upheld in the following cases:

Gardner v. *Ginther*, 232 App. Div. 296; aff. 257 N. Y. 578;

Board of Education v. *Wilson*, 277 App. Div. 809; aff. 303 N. Y. 107;

Monaco et al. v. *Allen*, 5 A. D. 2d 743; 4 N. Y. 2d 1032;

Board of Education v. *Allen*, 6 A. D. 2d 316; 6 N. Y. 2d 871, 361 U. S. 535.

The questions before this Court have already been determined by a Federal Court, *i.e.*, the United States District Court for the Northern District of New York, in which an opinion was rendered by Judge Brennan in 1949. Since the case is not reported, the full text of the opinion is attached hereto as "APPENDIX A" and made a part hereof.

This Court held in *Highland Farms Dairy* v. *Agnew*, 300 U. S. 608 at 612 as follows:

"How power shall be distributed by a State among its governmental organs is commonly, if not always, a question for the State itself."

Laramie County v. *Albany County*, 92 U. S. 307, and many cases cited;

Worcester v. *Street Railway*, 196 U. S. 539.

Where remedy exists in State Courts concerning a matter primarily of State Law, the Federal Courts will hesitate to assume jurisdiction under the principles of comity.

Defiance Water Co. v. *Defiance*, 191 U. S. 184;

Shanks v. *Banting Manufacturing Co.*, 9 F. 2d 116;

New Orleans v. *Benjamin*, 153 U. S. 411, 424.

Jurisdiction must be based on genuine and present controversies, not merely possible or conjectural problems.

Gully v. *First National Bank*, 299 U. S. 109, 113;

Koster v. *Turchi*, 173 F. 2d 605.

A finding of a substantial Federal question is foreclosed herein by decisions which this Court has made on the issues here involved.

It is well settled law that the jurisdiction of this Court is foreclosed where the Federal question presented is plainly unsubstantial because the question has been settled by prior decisions of this Court, so that the question can no longer be the subject of controversy.

In the words of Mr. Justice Sutherland in *Levering & Garrigues Co. et al.* v. *Morrin et al.* 289 U. S. 103, the Federal question here alleged is "plainly unsubstantial * * * because its unsoundness so clearly results from the previous decisions of this Court as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy."

To the same effect are:

California Water Service et al. v. *Redding et al.*, 304 U. S. 252;

Hannis Distilling Company v. *Baltimore*, 216 U. S. 285, 288;

McGilvra v. *Ross*, 215 U. S. 70, 76, 77-80;

Norton v. *Whiteside*, 239 U. S. 144;

Bianchi v. *Morales*, 262 U. S. 170;

Leonard v. *Vicksburg S. & P. R. Co.*, 198 U. S. 416, 421 and cases cited therein;

Delmar Jockey Club v. *Missouri*, 210 U. S. 324, 335.

As far as the questions themselves are concerned, the following cases have heretofore been decided by this Court, thus foreclosing the subject.

In *Newton* v. *Commissioners*, 100 U. S. 548, this Court upheld the power of a State to provide for the moving of a County seat, in spite of the locality having expended considerable sums to build a Courthouse, because of the absolute police power of the State over its subordinate or municipal corporations or other public bodies. The decision also affirmed the complete power of the State over all public offices within its reach which may be at pleasure created or abolished.

In *Mount Pleasant* v. *Beckwith*, 100 U. S. 514, this Court upheld the right of the State of Wisconsin to abolish a town and annex its territory to two other towns and thereafter to annex a piece of one of the newly reorganized towns to a city, without making any rules as to transfer of indebtedness. This case is particularly apposite to appellants' claims in relation to the requirement of the New York State law that each component school district must

continue to pay its own indebtedness. The Court stated at page 525 as follows:

> "Debts previously contracted must be paid entirely by the old corporation, nor has the new municipality any claim to any portion of the public property except what falls within her boundaries, and to that the old corporation has no claim whatever. *Laramie County* v. *Albany County*, 92 U. S. 307."

This holding relates to a case where no statutory regulation is made relating to the transfer or retention of indebtedness.

In this connection it will be remembered that in *Attorney General of the State of Michigan ex rel. Kies* v. *Lowrey*, 199 U. S. 233, this Court held that there was no constitutional question presented in the case of centralization of school districts under a Michigan statute where all property vested in the new school district and all indebtedness of component school districts spread over the new district.

In *Kelly* v. *Pittsburgh*, 104 U. S. 78, this Court upheld the power of the State of Pennsylvania to set a part of the Town of Alleghany into the City of Pittsburgh against the claim of the owner that this violated due process under the Fourteenth Amendment because of the imposition of city taxes on a farm. This case expressly refers to school taxes and the Court stated that as long as the tax was levied for a public purpose, this raised *no constitutional question, even though the owners of the farm might derive a smaller benefit than the owners of other property in the city*, the Court stating that a school tax had to be paid as well by those in the city who have no children.

The Court there indicated that it was not concerned with comparing benefits as a basis for the raising of a con-

stitutional question. This case is apposite, therefore, while the cases cited by appellants as a proper basis for jurisdiction of this Court are completely irrelevant in this connection. It is clear that support of public education is a public purpose and not a mere improvement or benefit to local property.

Another completely apposite decision of this Court was made in *Hunter* v. *Pittsburgh*, 207 U. S. 161. Here the city of Alleghany was annexed to the city of Pittsburgh under a unit vote statute where the entire enlarged area voted as a unit under circumstances where the voters of the smaller city were completely outvoted. The unit vote is the basis also of the establishment of the New York State central school district. In that case the due process argument was made, as it is here by appellants, and this Court completely disposed of the question by stating that the State by realignment of the territorial limits of a municipal corporation may shift real property to a new or different tax district without creating a Federal question, and that the method of voting there involved raises no constitutional question.

A similar decision was made in the case of *Cole et al.* v. *Norborne Land Drainage District*, 270 U. S. 45. Here the question involved related to a tax for drainage where land was added to a drainage district in Missouri against the wishes of the owner under the claim that this was a tax for benefits they did not share. Mr. Justice Holmes held, writing for the Court, that no violation of the due process clause was involved.

From the discussion hereinabove it seems abundantly clear that appellee based his determination on a fully reasonable and rational basis and fully complied with the

statutory requirements and procedures of the New York State Education Law in making his order of March 29, 1957, which is here under attack. The State Courts unanimously determined that there was no dispute as to the facts, as the record shows.

It is, therefore, respectfully submitted that the Federal questions sought to be presented, are plainly unsubstantial in that they have been completely foreclosed by large numbers of prior decisions of this Court, so that these questions can no longer be the subject of controversy in this Court.

Conclusion

It is therefore respectfully submitted that the appeal herein does not present a substantial federal question and it is respectfully urged that the appeal herein should be dismissed.

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APPENDIX A

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

—o—

LEONARD W. JENNE, ROY D. MILLS, RAYMOND L. MALONEY, MABEL B. JENSEN, MILTON DOUGHTON, LESLIE HORNER, LELA BETTIS, WALTER HALKO, STEVE G. ORMAN, THELMA S. HEFFER, individually and as Trustees respectively of Common School Districts Lysander #1, Lysander #11, Van Buren #4, Van Buren #2, Lysander #14, Lysander #2, Van Buren #9, Lysander #10, Lysander #1, all of the County of Onondaga, State of New York,

Plaintiffs,

vs.

STATE OF NEW YORK and FRANCIS T. SPAULDING, Commissioner of Education of the State of New York,

Defendant.

—o—

Appearances:

Furcinito & Rinaldo, Attorneys for Plaintiffs, S. A. & K. Building, Syracuse, New York, Mr. Charles R. Rinaldo, of Counsel.

Hon. Nathaniel L. Goldstein, Attorney General of State of New York, Attorney for Francis T. Spaulding, Comr. Education of the State of New York, Albany, New York, Ruth Kessler Toch, Asst. Attorney General, of Counsel.

Motion to Dismiss.

Argued May 17, 1949, Submitted May 19, 1949, Decided May 24, 1949.

BRENNAN, Judge.

Appendix A

Opinion

The plaintiffs bring this action as individuals and trustees of certain common school districts located in the Towns of Lysander and Van Buren, Onondaga County, New York, to restrain the defendant, as Commissioner of Education of the State of New York, from proceeding in accordance with the provisions of Article 37 of the Education Law of the State of New York (referred to in the complaint as Article 33), in the matter of the formation of a central school district. The crux of the action is the alleged unconstitutionality of the pertinent provisions of the Education Law of the State.

The present status of the action is as follows. A complaint was heretofore filed with the Clerk of this Court. A summons was issued and the defendant has appeared but has not yet answered. The original complaint prayed for temporary and permanent injunctions restraining the defendant from issuing an order under the provisions of Section 1801 of the Education Law which, in effect, would designate a certain territorial area which might later ripen into a legally functioning centralized school district, in accordance with the procedural provisions of the Law. Assuming the jurisdiction of this Court, the issuance of an interlocutory or permanent injunction required the convening of a three-judge court in accordance with the provisions of Title 28 U. S. C. 2281, etc. A temporary restraining order was applied for and was denied under the provisions of Title 28 U. S. C. 2284, subdivision 5. Upon the hearing relative to the temporary restraining order, the question of the jurisdiction of this Court was raised by the defendant, and since such question appeared to

be serious, a date was set for argument thereon. Prior to the date of argument the plaintiff served an amended complaint. The amendment made did not appear to obviate the objections to jurisdiction, so that argument was addressed to the amended complaint; briefs were filed, and the question is submitted for decision.

Upon the argument the power of a single judge to determine jurisdiction in this case was raised by the plaintiffs. It is understood that such question is no longer seriously urged, and no further discussion thereof is necessary, except to state that the reported cases seem to be uniform in holding that the matter of the convocation of a three-judge court, is one of legal concern and practical importance, and that it is the duty of the judge to whom the application for an injunction is presented to scrutinize the complaint and determine whether or not jurisdiction exists.

Ex parte Porseky, 290 U. S. 30;
Carras, et al. v. *Monoghan (Dravo Corp., Intervener)*, 65 F. Sup. 658;
Priceman v. *Dewey, Gov. et al.*, 81 F. Sup. 557.

The amended complaint now before the Court is not a model of pleading. Its first allegation is "The action arises under the Fourteenth amendment of the Constitution of the United States, as hereinafter more fully appears." It is, therefore, definite that plaintiffs depend upon the existence of a question in this action which arises under the Constitution of the United States. The basis of jurisdiction, therefore, must be found in Title 28 U. S. C. 1331, which provides in substance that the district courts shall have original jurisdiction of all actions where the matter in controversy exceeds the sum or value of three

thousand dollars, exclusive of interest and costs, and arises under the Constitution of the United States. The section by its language requires, (a), that the matter in controversy exceeds the sum or value of three thousand dollars; (b), the existence of a constitutional question. Recourse must be had to the complaint to determine whether or not such elements are found therein.

Nowhere in the complaint is there any allegation of a money loss to the plaintiffs, either individually or collectively. No attempt is made to allege in any manner the value of the rights which plaintiffs claim are affected or presently endangered. The language of the statute upon which plaintiffs depend to give this Court jurisdiction requires that it must be pleaded that the matter in controversy exceeds the sum or value of three thousand dollars. If such an allegation be challenged, the plaintiffs must support same by proof. Hence, it appears without question that the complaint is insufficient on its face. The following quotation is applicable here.

> "The prerequisites to the exercise of jurisdiction are specifically defined and the plain import of the statute is that the District Court is vested with authority to inquire at any time whether these conditions have been met. They are conditions which must be met by the party who seeks the exercise of jurisdiction in his favor. *He must allege in his pleading the facts essential to show jurisdiction. If he fails to make the necessary allegations he has no standing.* If he does make them, an inquiry into the existence of jurisdiction is obviously for the purpose of determining whether the facts support his allegations" (Emphasis supplied).
>
> *McNutt* v. *General Motors, etc. Corp.*, 298 U. S. 178 at 189.

Appendix A

The following decisions with the cases cited therein are additional authorities for the conclusion reached above.

American Distilling Co. v. *City of Sausalito*, 73 F. Sup. 520;

Troy Laundry Co. v. *Lockwood*, 63 F. Sup. 384;

Buck v. *Case*, 24 F. Sup. 541 (Reversed on procedural grounds 307 U. S. 95).

The decision might end here, but since the existence of a constitutional question was argued and briefed by the parties, it is deemed advisable to resolve the conflict to avoid further unnecessary litigation.

Plaintiffs seem to rely upon their status as (a), trustees of common school districts possessing powers and charged with duties as provided by the Education Law of the State; (b), as voters within their particular school districts; (c), as taxpayers and real estate owners within their particular autonomous school tax area. They allege in a somewhat conclusive manner that their rights and their properties will be adversely affected if the defendant should make and enter in his office an order laying out territory which would include their properties in a proposed new central school district, as authorized by Section 1801 of the Education Law. Upon the argument the Court was impressed that the plaintiffs' principal claim was that the statute under consideration constitutes an unlawful delegation of power to the defendant Commissioner; that such delegation is in violation of the United States Constitution.

An examination of the statute involved discloses that the proposed action of the Commissioner is but an administrative act or a procedural means which will afford a basis

for further action by the qualified voters within the territory affected.

After the order above referred to is filed, the statute provides that a petition *may be* presented by the required number of qualified voters, which petition in substance requests that a central school district be organized or established embracing the territory referred to in the order. The petition is to be filed with the Commissioner, and if he finds same to be in accordance with law, he shall fix a time and place for a meeting of the qualified voters of the proposed district. At such meeting, the voters may by their votes adopt or reject the proposed establishment of a central school district. In the event that centralization is rejected, then the common school districts, and the officers thereof, such as represented by the plaintiffs herein would be unaffected. In the event that centralization is adopted, the statute provides in some detail for the functioning thereof, and the consolidation of the common school districts therein. The burden of plaintiffs' complaint is that the anticipated order of the Commissioner which has not yet been issued—although it is undisputed that the issuance of such an order is contemplated—would set in motion proceedings outlined above, which would result in plaintiffs' damage. It seems clear, however, that no actual damage can flow from the issuance of the order, since it has no force until and unless three subsequent events happen: (1), the inhabitants of the district desire to submit the question of centralization to a vote of the inhabitants and they express such desire in the form of a petition as provided by statute; (2), the Commissioner finds the petition sufficient under the law and designates a time and place for a meeting of the voters of the area affected; and

(3), the voters at such meeting by their votes favor the centralization of the area for educational purposes.

The allegations and inferences of the complaint and the statements made upon argument that these plaintiffs would be deprived of the office of trustee in their respective school districts; that the power of their votes as constituent members of their individual school districts will be lost; that they will be adversely affected by the creation of a new school tax district, are all theoretical rather than definite, and depend upon action in the future by the voters of the district which no one can successfully foretell, and concerning which this Court is not allowed to speculate.

The constitutionality of the sections of the Education Law of the State has been directly passed upon in the state courts. (*Gardner* v. *Ginther*, 232 A. D. 296; affirmed without opinion in 257 N. Y. 578.) The opinion discusses the question at length and with clarity. It, in effect, holds that the action of the Commissioner complained of herein is an administrative and not a legislative act. The history of the Education Law of the State is outlined therein in a clear and persuasive manner. The State must legislate within the framework of the United States Constitution, and the decision in the cited case is highly persuasive here.

> "How power shall be distributed by a state among its governmental organs is commonly, if not always, a question for the state itself."
>
> *Highland Farms Dairy* v. *Agnew*, 300 U. S. 608 at 612.

The existence of a federal or constitutional question is the subject of many judicial decisions covering a long period of time. It may be correct that all judicial precedents

may not be reconciled, but it seems to be well recognized that where a remedy exists in state court concerning a matter primarily of state law, the federal courts will hesitate to assume jurisdiction under the principles of comity.

Defiance Water Co. v. *Defiance*, 191 U. S. 184;
Shanks v. *Banting Mfg. Co.*, 9 F. 2nd 116;
New Orleans v. *Benjamin*, 153 U. S. 411, 424.

It is also uniformly recognized that "A genuine and present controversy, not merely a possible or conjectural one must exist * * *" to sustain jurisdiction.

Gully v. *First National Bank*, 299 U. S. 109, 113;
Koster v. *Turchi*, 173 F. 2nd 605.

Here, as in *American Distilling Co.* v. *City of Sausalito*, *supra*, any injury is subject to a condition precedent; to-wit, the ratification by the voters of the discussed plan, which, of course, may never occur. (See also *Highland Farms Dairy* v. *Agnew*, *supra*.)

In determining jurisdiction here the finding of a substantial federal question may be foreclosed by decisions which have already determined the issues raised. (*Levering & G. Co.* v. *Morrin*, 289 U. S. 103; *Water Service Co.* v. *Redding*, 304 U. S. 252.) An examination of the issues sought to be raised in the complaint indicates that such a situation exists here. Same will be briefly referred to. The office of trustee may be abolished or the duties thereof modified. (*Newton* v. *Commissioners*, 100 U. S. 548 at 559.) Municipal corporations created by the authority of the State Legislature are subject to the control of the state creating them. (*Mt. Pleasant* v. *Beckwith*, 100 U. S. 514, 534.) The State by re-alignment of the territorial limits of a municipal corporation may shift real property

to a new or different tax district. (*Kelly* v. *Pittsburgh*, 104 U. S. 78; *Hunter* v. *Pittsburgh*, 207 U. S. 161, 179.) The method of voting upon the question of centralization raises no constitutional question. (*Hunter* v. *Pittsburgh, supra*, at 177; *Cole* v. *Norborne Drainage Dist.*, 270 U. S. 45.)

As seems to be peculiar to this type of action affecting inhabitants of a comparatively small territorial area, this case has prompted arguments which are of no force, and the motives and actions of the champions of opposing forces are of no concern whatever. The question is solely one of jurisdiction, and that question alone is decided here.

As indicated above, this Court is without jurisdiction, and the complaint must be dismissed.

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IN THE

Supreme Court of the United States

October Term, 1961

No. 117

IN THE MATTER

of

JOHN W. SOERGEL, THOMAS MAFRICI, LEO R. PRIEST, THOMAS CRANDALL, CARMEN FERRANTE, CHARLES TEDESCO, and the BOARD OF TRUSTEES OF UNION FREE SCHOOL DISTRICT NO. 6,

Appellants,

vs.

JAMES E. ALLEN, as Commissioner of Education of the State of New York,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

REPLY

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Appellee.

On Appeal From The Court Of Appeals
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REPLY

The net effect, if not the purpose, of appellee's motion to dismiss the appeal is to divert attention from the constitutional points raised by the appellants, and concentrate on legal ques-

tions which, so far as this Court is concerned, have been conclusively determined by the decision of the Court of Appeals of the State of New York. For example, at the very end of his motion papers, appellee states:

> "From the discussion hereinabove it seems abundantly clear that appellee based his determination on a fully reasonable and rational basis and fully complied with the statutory requirements and procedures of the New York State Education Law in making his order of March 29, 1957, which is here under attack."

Appellants do not and cannot question that under the decision of the New York Court of Appeals what the appellee did in putting District No. 6 in the new Central School District was sanctioned by the New York State Education Law.

Appellants do, however, contend that under such construction of the New York State statute their constitutional rights under the Fourteenth Amendment were violated in that, having the legal right to use the Syracuse school system, they could receive no possible benefit from being put in the new Central School District and having imposed upon them the burden of a new central school system for which they have no use.

This constitutional contention of appellants is sharply focused by two arguments made on pages 20 and 21 of appellee's motion papers.

On page 21 appellee states:

> "The system is a state education system and is supported by a combination of State and local taxation. If schools are purely a local benefit as appellants claim, then statewide taxation to support local schools would be likewise improper."

Appellants do not now claim and have never claimed that the statewide taxes which they are paying,—income taxes and

other statewide taxes,—are unconstitutional or improper because of these taxes are being used by the state for the support of education in the state. But they do claim that the local real property taxes which the new Central School District will levy on their real property are invalid and unconstitutional because appellants, for the reasons stated in their jurisdictional statement, will and can derive no benefit from such local taxes.

On page 20 of his motion papers appellee speaks of voting rights which appellants will gain as a result of centralization. The inference apparently is that appellants did not have voting rights prior to the affirmance of the Commissioner's centralization order by the New York courts. The facts are that appellants were voters in their own separate and independent school system which they controlled. They elected a school board each year. They levied and collected taxes. They provided transportation for the district's children to Syracuse schools. And they had—and have still—as a matter of statute the *right* to a tuition-free education for the district's children in Syracuse schools. (See the bottom of page 5 and the top of page 6 of the Jurisdictional Statement herein.) (Appellee on his motion to dismiss now changes his position and asserts on page 20 of his motion papers that the children of the district attend the Syracuse schools "on sufferance.")

Appellants, and the other residents of District No. 6, are deprived by centralization of these most valuable and meaningful voting rights. Such voting rights as they receive under centralization are factually meaningless, since they will be but a minority among the total number of voters in the whole Central District. And, as part of the Central School District, there seems to be no way that appellants can assure their children of transportation to the Syracuse schools.

On page 18 of his motion to dismiss appellee cites In the Matter of the *Board of Education of Union Free School Dis-*

trict No. 3 of the Town of Oyster Bay etc. v. Allen (361 U. S. 535). This case is readily distinguishable. In the cited case the appellants did not have a complete school system. For example, they had in their district no high school. The appellants here have the statutory right to have their children attend the Syracuse schools and use all the facilities of this complete educational system. Appellants object to paying local real property taxes to support the new central school system for which they have no use and from which they will receive no benefits.

Respectfully submitted,

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